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Supreme Court of the United States

OCTOBER TERM, 1954

No. 64

ODOM FARRELL SULLIVAN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1954

CERTIORARI GRANTED JUNE 7, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 64

ODOM FARRELL SULLIVAN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Tenth Circuit		1
Caption (omitted in printing)	a	
Record from the U.S.D.C. for the District of Kansas	1	1
Indictment, Case No. 8751	1	1
Indictment, Case No. 8752	3	3
Arraignment and plea statement	4	4
Motion for bill of particulars, Case No. 8751	5	5
Points and authorities	9	9
Motion for bill of particulars, Case No. 8752	11	11
Orders sustaining motion for bills of particulars	16	16
Bill of particulars, Case No. 8751	18	18
Bill of particulars, Case No. 8752	21	22
Motion to dismiss	23	23
Plaintiff's Exhibit 1—Affidavit of Charles S. Lyon	24	24
Defendant's Exhibit A—Letter dated January 31, 1952 from Ellis N. Slack to Llewellyn A. Luce	25	25
Narrative statement of transcript of proceedings in re plea of nolo contendere etc.	26	26
Appearances	26	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 16, 1954.

—6289

	Original	Print
Record from the U.S.D.C. for the District of Kansas—Continued		
Transcript of proceedings of May 26, 1953 in re sentences	27	27
Opening statement on behalf of plaintiff	28	28
Judgment and commitment, Case No. 8751	41	40
Judgment and commitment, Case No. 8752	42	41
Motion in arrest of judgment	43	42
Motion to set aside judgment of conviction and to permit defendant to withdraw his plea of nolo contendere	43	42
Amended motion to set aside judgment of conviction and permit defendant to withdraw his plea of nolo contendere	44	43
Petition for probation	51	50
Affidavit of W. D. Jochems in support of defendant's amended motion to set aside judgment of conviction and permit defendant to withdraw plea of nolo contendere	57	56
Affidavit of Tom Harley, Jr.	59	57
Affidavit of Llewellyn A. Luce	63	61
Affidavit of Eugene W. Davis	68	66
Affidavit of Robert H. Bingham	73	71
Exhibit B—Narrative statement of transcript of proceedings on motion in arrest of judgment, etc.	75	73
Appearances	75	73
Testimony in support of petition for probation	76	73
Earl Schaeffer	76	74
Frank T. Priest	76	74
Grover Pierpont, et al.	77	75
Winfield Brasch	78	75
Argument by Eugene W. Davis	78	76
Testimony of Burt N. Morgan	79	76
Denial of motion to set aside judgments etc.	89	89
Order denying motions in arrest of judgment, etc.	89	89
Findings of fact	90	89
Stipulation re minutes of proceedings of conference in Washington, D. C.	93	92
Order to transmit original exhibit to U.S.C.A. (omitted in printing)	94	
Notice of appeal, Case No. 8751	94	93
Notice of appeal, Case No. 8752	96	94
Supersedeas and appearance bonds statement	97	95
Election of defendant not to commence service of sentence	98	96
Statement of points	98	96
Orders extending time for docketing causes statement	98	96
Clerk's certificate (omitted in printing)	99	

		Original	Print
Argument and submission	(omitted in printing)	101	
Opinion, Phillips, J.		101	97
Judgment, Case No. 4741		106	102
Judgment, Case No. 4742		107	102
Clerk's certificate	(omitted in printing)	107	
Order granting certiorari		109	103

[fol a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Pleas and Proceedings before the Honorable Walter A. Huxman, United States Circuit Judge, Assigned, the Honorable Delmas C. Hill, one of the Judges of the United States District Court for the District of Kansas, presiding in the following entitled causes:

UNITED STATES OF AMERICA, Plaintiff,

v.

ODOM FARRELL SULLIVAN, Defendant

No. 8751.—Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

ODOM FARRELL SULLIVAN, Defendant

No. 8752.—Criminal

INDICTMENT—Filed February 28, 1952

No. 8751

The grand jury charges:

Count One

On or about March 14, 1946, in the District of Kansas, Odom Farrell Sullivan did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the

Collector of Internal Revenue for the Internal Revenue Collection District of Kansas, at Wichita, a false and fraudulent income tax return wherein he states that his net income for said calendar year was the sum of $15,064.27 and that the amount of tax due and owing thereon was $4,595.36, whereas, as he then and there well knew, his net income of the said calendar year was the sum of $39,721.64, upon which said net income he owed to the United States of America an income tax of $19,511.85.

[fol. 2] Count Two

On or about March 15, 1947, in the District of Kansas Odom Farrell Sullivan did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas, at Wichita, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $18,284.69 and that the amount of tax due and owing thereon was $5,309.09, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $40,010.45, upon which said net income he owed to the United States of America an income tax of $17,776.52.

Count Three

On or about March 15, 1948, in the District of Kansas, Odom Farrell Sullivan did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas, at Wichita, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $9,695.80 and that the amount of tax due and owing thereon was $1,921.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $37,560.92, upon which said net income he owed to the United States of America an income tax of $16,244.54.

Count Four

On or about May 16, 1949, in the District of Kansas, Odom Farrell Sullivan, who during the calendar year 1948 was married, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for said calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas, at Wichita, a false and fraud-
[fol. 3] ulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income of said calendar year was the sum of $60,868.53 and that the amount of tax due and owing thereon was the sum of $21,661.81, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $82,027.15, upon which said net income there was owing to the United States of America an income tax of $32,814.15.

A True Bill.

Neville T. Larson, Foreman.

Eugene W. Davis, Assistant United States Attorney.
Bond fixed at $10,000.00.
Walter A. Huxman, Judge Assigned.

In United States District Court

Indictment—Filed February 28, 1952

No. 8752

The grand jury charges:

Count One

On or about March 14, 1946, in the District of Kansas, Odom Farrell Sullivan, who was the president of Central Theatre Company, Inc., a corporation, did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the

Internal Revenue Collection District of Kansas, at Wichita, a false and fraudulent tax return wherein he reported that the net income of the corporation for the calendar year was the sum of $4,325.21 and that the net income for declared-value excess-profits tax computation was the sum of $4,633.56, that the amount of income tax due thereon was the sum of $1,081.30 and the amount of declared-value excess-profits tax due thereon was $446.63, whereas, as he then and there well knew, the net income of the corporation [fol. 4] for the said calendar year was the sum of $16,576.52 and the net income for declared-value excess-profits tax computation was the sum of $16,884.87, upon which net income the corporation owed to the United States of America an income tax of $3,202.55 and a declared-value excess-profits tax of $2,063.80.

Count Two

On or about March 15, 1947, in the District of Kansas, Odom Farrell Sullivan, who was the president of Central Theatre Company, Inc., a corporation, did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas, at Wichita, a false and fraudulent tax return wherein he reported that the net income of the corporation for the said calendar year was the sum of $5,198.93 and that the total amount of tax due thereon was the sum of $1,095.76, whereas, as he then and there well knew, the net income of the corporation for the said calendar year was the sum of $13,197.44, upon which net income the corporation owed to the United States a total tax of $2,935.41.

A True Bill.

Neville T. Larson, Foreman.

Eugene W. Davis, Assistant United States Attorney.
Bond fixed at $2,500.00

Walter A. Huxman, Judge Assigned.

Clerk's Note: On September 8, 1952, Defendant Odom Farrell Sullivan appeared in Court with his attorney, was arraigned, and entered a plea of not guilty to each of indictments No. 8751 or No. 8752.

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION FOR BILL OF PARTICULARS—Filed March 20, 1952

No. 8751

Come now the Defendant, Odom Farrell Sullivan, and moves the Court for an order requiring the plaintiff, United States of America, to furnish him with a Bill of Particulars showing wherein his income tax returns, filed for the calendar years of 1945, 1946, 1947 and 1948 respectively which are the basis for the first, second, third, and fourth counts, respectively, of the Indictment herein, are false and fraudulent, in respect to which Defendant states:

Count One of the Indictment sets forth that the income tax return filed by defendant for the year of 1945 states his net income for said year was $15,064.27, and the tax thereon was $4,505.36, that he well knew his actual or correct net income in 1945 was $39,721.64 and the tax thereon was $19,511.85; that

Count Two of the Indictment sets forth that the income tax return filed by defendant for the year 1946 states his net income for said year was $18,284.69 and the tax thereon was $5,309.09, whereas he well knew his net income for said year was $40,010.45 and the tax thereon was $17,776.52; that

Count Three of said Indictment sets forth that the income tax return filed by Defendant for the year 1947 states his net income for said year was $9,695.80 and the tax thereon was $1,921.60, whereas he well knew his net income for said year was $37,560.92 and the tax thereon was $16,244.54; and that

Count Four of the Indictment herein sets forth that the income tax return filed by defendant and his wife for the year 1948 states their net income for said year was $60,868.53 and the tax thereon was $21,661.81, whereas he well

knew their correct net income for said year was $82,027.15 and the tax thereon was $32,-14.15.

Defendant states, Counts One, Two, Three and Four of the Indictment do not show whether the allegations in the Indictment are founded or based upon gross income from the operation of his business and that the income referred to in each of the counts has been understated, or whether [fol. 6] the United States claims that the defendant made improper and unlawful deductions from the gross income, to reach the net income set out in each of the returns referred to. Defendant is unable to defend himself against the charges set out in each of the counts of said Indictment, unless he is informed as to whether or not the United States alleges and claims, that the incomes from defendant's business or businesses was understated in the returns as filed, or whether or not the United States, through its representatives, disallowed deductions claimed and unlawfully taken by defendant from the gross income shown in said returns.

Defendant states that he is unable to determine from the allegations in each of the counts of said indictment whether or not the United States charges or claims that certain specific items of income were omitted from each of the said returns filed by defendant, or whether the United States charges and claims that the defendant made expenditures in excess of income alleged in said returns, and in excess of other money and other property owned by the defendant at the time the expenditures were made.

If the United States intends to attempt to prove that the defendant, during the taxable years of 1945, 1946, 1947 and 1948, received taxable income from unreported sales or from payments or other profits in addition to those reported in his said return for the respective years, the defendant should be informed of the nature of the said alleged unreported sales or profits and the respective amounts of each transaction constituting said profit, in order to enable the defendant to prepare a defense against such charges or attempted proof by the United States of additional income or unreported sales, profits, or payments.

If the United States claims or charges that the Defendant, for the respective years 1945, 1946, 1947 and 1948,

claimed and took improper and unlawful deductions in making his tax returns for said years, the defendant should be informed with respect to the claim or claims of the United States as to the said improper deductions and the nature and amount of each deduction in order to enable the defend-
[fol. 7] ant to prepare his defense against the charges of taking unlawful deductions.

Defendant is uninformed as to the methods used by the United States and/or its representatives in determining that defendant failed or refused to report a substantial part of his taxable income during the respective years 1945, 1946, 1947 and 1948. Defendant knows not whether said additional income for said years as charged by the United States in the indictment, has been computed on what is known as the "net worth" method, "net worth and expenditures" method, "gross bank deposits" method, or whether the alleged additional income charged against the defendant has been computed on the basis of sums which the United States claims was actually received by the defendant during the respective years and not reported as income by defendant. The defendant should be informed of the method used by the United States in computing income charged against defendant in order that he may be properly prepared to defend himself against the charges set forth in said indictment.

As a resume of the circumstances and conditions surrounding the said Indictment, defendant states neither of the Counts in said Indictment informs Defendant of sufficient facts and circumstances to enable him to properly prepare his defense against the alleged charges or whether he faces charges based upon unreported income, net worth computation made by the United States by which defendant is charged with additional income on account of increases of net worth and expenditures made, or whether he faces the charge of taking unlawful deductions or failing to report specific items of income during the respective years 1945, 1946, 1947 and 1948.

Wherefore, each count of said Indictment being in words phrases similar, and to the same legal effect, varying only as to different amounts for the respective years, defendant moves that the United States be required, by order of this court, to furnish defendant with a bill of particulars, with

respect to each count of the said Indictment, by showing the following:

(a) The amount of sales, gross receipts and profits which [fol. 8] the United States claims were received by Defendant during the respective years 1945, 1946, 1947 and 1948, and which, it is charged, he failed to report in his tax returns for said respective years.

(b) If the additional income charged to have been received by defendant for the respective years, 1945, 1946, 1947 and 1948, has been computed by the United States on the basis of an increase in net worth during the said years, a statement should be made in the bill of particulars, showing the alleged increase in net worth for each of the said years, the beginning net worth as claimed by the United States as of January 1, 1945, and the closing net worth of defendant as claimed by the United States, for the respective years ended December 31, 1945, December 31, 1946, December 31, 1947 and December 31, 1948.

(c) If the additional income charged against Defendant has been computed on the net worth and expenditure basis, a statement of the expenditures charged against the defendant during the respective years 1945, 1946, 1947 and 1948, and used by the United States in computing income against him for the respective years, on the expenditare basis.

(d) If the additional income charged against the defendant has been computed on the basis of unlawful and improper deduction claimed and taken by the defendant from his gross income for the respective years 1945, 1946, 1947, and 1948, a statement showing the alleged improper deductions and the respective amounts thereof.

(e) If the alleged additional income charged by the United States against the defendant, has been computed by the United States on the basis of a combination of alleged unreported sales or profits, disallowance of deductions taken by defendant, or an increase in the net worth plus expenditures of defendant, then a statement informing the defendant of the additional income computed and charged against him by the United States by any or all of the aforesaid methods of computation.

(f) If it is charged that the defendant received income

[fol. 9] from sources other than those shown on the returns filed by him for the respective years, a statement showing what the sources of such income were and the respective amounts received thereby for each of said years.

(g) If it is charged that the defendant made sales of property or merchandise from which he received taxable income during the respective years other than that shown on his return, a statement showing the nature of the transactions and the respective amounts thereof, giving particulars respecting such transactions, as will enable the defendant to defend himself against such charges.

(h) Define the term "net income" as used in the respective Counts of the Indictment by showing the several items of income including the respective amounts thereof that constitute the alleged unreported income, towit, the difference between the reported income of $15,064.27 for the year 1945, and the income charged by the United States for said year, $39,721.64; the difference between reported income of $18,248.69 for the year 1946 and the income charged by the United States for said year, $40,010.45; the difference between the reported income of $9,695.80 for the year 1947, and the income charged by the United States, $37,560.92 for said year, and the difference between the reported income of $60,868.53 for 1948 and the income charged by the United States, $82,027.15 for said year.

Respectfully submitted, Tom Harley, Jr., Llewellyn A. Luce, Walter H. Maloney, Attorneys for Defendant.

POINTS AND AUTHORITIES

Rule 7(f), Federal Rules of Criminal Procedure: "The Court for cause may direct the filing of a bill of particulars * * *". This rule has been liberally construed for the protection of defendants. United States v. Chapman, 168 F(2nd) 997; Rose v. United States, 128 F. (2d) 622, 317 [fol. 10] U. S. 651; United States v. Yoffe, 52 F. Supp. 175.

Comment on this rule has been widely discussed. A fair representation of the discussion is "Fraud under Federal Tax Law" (Harry Graham Balter), page 262:

"2. Where the indictment or information refers to 'other income' in a given amount without specifying the nature or source of this 'other income', a bill of particulars to clarify the omnibus items will be granted.

"3. By analogy where the indictment or information refers to an item of 'net income' without further explanation, a bill of particulars should be ordered filed to explain the nature and source of the items making up 'net income'."

Cases cited above.

As far as the defendant in this case is concerned, the words "net income" could be left out of the indictment and he would know approximately as much about the charges against him as he is able to learn from the naked words "net income" in the indictment.

The operation of defendant's business is a year around collection of various transactions. There are apparently only a few of them to which the Government takes exception. It will not prejudice the rights or position of the Government or its ability in presenting the case to designate those transactions in such way as the defendant will be in a position to present evidence respecting them and thus have the fair trial to which he is entitled.

The reason for granting the motion for a bill of particulars is to protect the defendant from vague charges and surprises at the trial. The rule respecting a bill of particulars is an old one and has not been changed by the new rules of Criminal Procedure. Rosen v. United States, 161 U. S. 29. Discussed in Bryan vs. U. S. 175 Fed. (2d) 223.

The basic guide for passing on a bill of particulars is well settled. Fraud under Federal Tax Law (Balter) page [fol. 11] 260: "that a defendant is entitled to a bill of particulars where the indictment or the information, al-

though sufficient in law to charge an offense, is so lacking in particularity or in information, or is so extremely general in the language of the charge that the defendant is not given a fair and reasonable opportunity to prepare for his defense or trial." 27 Am. Jur. 673, Indictments and Information, Sec. 113.

Accused may demand bill of particulars as a matter of right where the charge is couched in such language that the accused may be surprised or unprepared. Singer v. U. S., 58 F. (2) 74.

Wherein an indictment, though sufficient, is couched in language such as the accused is liable to be surprised, the remedy is a bill of particulars. O'Neil v. U. S., 19 F. (2) 322; McMullen v. U. S. 96 F. (2d) 574.

We believe that in this case a bill of particulars is merited and that the Court should order the United States to prepare the same.

Respectfully submitted, Tom Harley, Jr., Llewellyn A. Luce, Walter H. Maloney, Attorneys for Defendant.

[Proof of service on original.]

IN UNITED STATES DISTRICT COURT

MOTION FOR BILL OF PARTICULARS—Filed March 20, 1952

No. 8752

Comes now the Defendant, Odom Farrell Sullivan, and moves the Court for an order requiring the plaintiff, United States of America, to furnish a Bill of Particulars showing wherein the income tax returns filed by him for the Central Theatre Company, Inc., a corporation, for the calendar years of 1945 and 1946, respectively, which are the basis for the first and second counts of the Indictment herein,

are false and fraudulent, in respect to which Defendant states:

[fol. 12] Count One of the Indictment sets forth that the income tax return filed by defendant as president of said corporation, for the year 1945, states its net income for said calendar year was $4,325.21 and the tax thereon was $1,081.30, and the net income for declared-value excess-profits tax for said year was $4,633.56 and the tax thereon was $446.63; whereas he then knew the actual or correct net income of said corporation for 1945 was $16,576.52 and the tax thereon was $3,202.35, and the net income for declared-value excess-profits tax was the sum of $16,884.87, and the tax thereon was $2,063.80; that

Count Two of the Indictment sets forth that the income tax return filed by defendant as president of said Corporation for the year 1946, states its net income for said year was $5,198.93 and the tax thereon was $1,095.76, whereas he well knew the net income of said corporation for said calendar year was $13,197.44 and the tax thereon was $2,935.41.

Defendant states, Counts One and Two of the Indictment do not show whether the allegations in the Indictment are founded or based upon, gross income from the operation of the business of the corporation and that the income referred to in each of the counts has been understated, or whether the United States claims that the defendant made improper and unlawful deductions from the gross income, to reach the net income set out in each of the returns referred to. Defendant is unable to defend himself against the charges set out in each of the counts of said indictment, unless he is informed as to whether or not the United States alleges and claims that the income from the business of the corporation was understated in the returns as filed, or whether or not the United States, through its representatives, disallowed deductions claimed and unlawfully taken by defendant

for said corporation from the gross income shown in said returns.

Defendant states that he is unable to determine from the allegations in each of the counts of said indictment whether or not the United States charges or claims that certain specific items of income were omitted from each of the said returns filed by defendant for said corporation or [fol. 13] whether the United States charges and claims that expenditures were made in excess of income alleged in said returns, and in excess of other money and other property owned by the corporation at the time the expenditures were made.

If the United States intends to attempt to prove that the corporation, during the taxable years of 1945 and 1946, received taxable income from unreported sales or from payments or other profits in addition to those reported in the income tax returns of the corporation for the respective years, the defendant should be informed of the nature of the said alleged unreported sales or profits and the respective amounts of each transaction constituting said profit, in order to enable the defendant to prepare a defense against such charges or attempted proof by the United States of additional income or unreported sales, profits or payments.

If the United States claims or charges that the Defendant, for the respective years 1945 and 1946 claimed and took improper and unlawful deductions in making tax returns for the Corporation for said years, the defendant should be informed with respect to the claim or claims of the United States as to the said improper deductions and the nature and amount of each deduction in order to enable the defendant to prepare his defense against the charges of taking unlawful deductions.

Defendant is uninformed as to the methods used by the United States and/or its representatives in determining that defendant failed or refused to report a substantial part of the taxable income of the corporation during the

respective years 1945 and 1946. Defendant knows not whether said additional income for said years as charged by the United States in the Indictment, has been computed on what is known as the "net worth" method, "net worth and expenditures" method, "gross bank deposits" method, or whether the alleged additional income charged against the defendant has been computed on the basis of sums which the United States claims was actually received by the defendant during the respective years and not reported as income of the corporation. The defendant should be informed [fol. 14] of the method used by the United States in computing income charged against the corporation in order that he may be properly prepared to defend himself against the charges set forth in said indictment.

As a resume of the circumstances and conditions surrounding the said Indictment, defendant states neither of the Counts in said Indictment informs Defendant of sufficient facts and circumstances to enable him to properly prepare his defense against the alleged charges or whether he faces charges based upon unreported income, net worth computation made by the United States by which the corporation is charged with additional income on account of increase of net worth and expenditures made, or whether he faces the charge of making unlawful deductions or failing to report specific items of income to the corporation during the respective years 1945 and 1946.

Wherefore, each count of said Indictment being in words and phrases similar, and to the same legal effect, varying only as to different amounts for the respective years, defendant moves that the United States be required, by order of this Court, to furnish defendant with a bill of particulars, with respect to each count of the said indictment, by showing the following:

(a) the amount of sales, gross receipts and profits which the United States claimed were received by the corporation during the respective years 1945 and 1946 and which, it is charged, defendant failed to report in the corporation income tax returns for said respective calendar years.

(b) If the additional income charged to have been received by the corporation for the respective years, 1945 and 1946 has been computed by the United States on the

basis of an increase in net worth during the said years, a statement should be made in the bill of particulars, showing the alleged increase in net worth for each of the said years, the beginning net worth as claimed by the United States as of January 1, 1945, and the closing net worth of the corporation as claimed by the United States, for the respective years ended December 31, 1945, and December 31, 1946.

[fol. 15] (c) If the additional income charged against the corporation has been computed on the net worth and expenditure basis, a statement should be made in a bill of particulars of the expenditures charged against the corporation during the respective years, 1945 and 1946, a statement should be made showing the alleged improper deductions and the respective amounts thereof.

(e) If the alleged additional income charged by the United States against the defendant, has been computed by the United States on the basis of a combination of alleged unreported sales or profits, disallowance of deductions taken by defendant for the corporation, or an increase in the net worth plus expenditures of the corporation, then a statement should be made in a bill of particulars informing the defendant of the additional income computed and charged against the corporation by the United States by any or all of the aforesaid methods of computation.

(f) If it is charged that the corporation received income from sources other than those shown on the returns filed by the defendant for the corporation, for the respective years, a statement should be made in a bill of particulars showing what the sources of such income were and the respective amounts received thereby for each of said calendar years.

(g) If it is charged that the corporation made sales of property or merchandise from which was received taxable income during the respective years other than that shown on its returns, a statement should be made in a bill of particulars showing the nature of the transactions and the respective amounts thereof, giving particulars respecting such transactions, as will enable the defendant to defend himself against such charges.

(h) Define the term "net income" as used in the respective Counts of the Indictment by showing the several items

of income, including the respective amounts thereof, that constitute the alleged unreported income, towit, the difference between the reported net income of $4,325.21 for the year 1945, and the net income of $16,576.52 charged by the United States for said year; the difference between re-
[fol. 16] ported "net income for declared-value excess-profits tax" of $4,633.56, for said calendar year 1945, and the "net income for declared-value excess-profits tax" of $16,884.87, charged by the United States for said year; and the difference between reported net income of $5,198.93 for the year 1946, and the net income of $13,917.44 charged by the United States for said year.

Respectfully submitted, Tom Harley, Jr., Llewellyn A. Luce, Walter H. Maloney, Attorneys for Defendant.

[Proof of service on original.]

[Points and authorities attached to above motion identical with those printed at page 9.]

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION FOR BILL OF PARTICULARS—June 12, 1952

No. 8751

Now on this 22nd day of May, 1952, this matter came on to be heard on the defendant's motion for an order requiring the plaintiff, The United States of America, to furnish a Bill of Particulars showing wherein the income tax returns filed by him, for the calendar years of 1945, 1946, 1947 and 1948 respectively, which are the basis for the first, second, third and fourth counts, respectively, of the Indictment herein, are false and fraudulent; plaintiff being present by Eugene W. Davis, Deputy United States Attorney; the defendant being present by his attorneys, Llewellyn A. Luce, Walter H. Maloney and Tom Harley, Jr.

The court after examining the files, hearing the argument of counsel, took the matter under advisement.

Now on this 12th day of June, 1952, this matter came on for further hearing and the court finds that said motion should be sustained.

It is now, therefore, ordered that said plaintiff, The United States of America, be and hereby is ordered to fur- [fol. 17] nish to said defendant a Bill of Particulars showing wherein the income tax returns filed by him for the years 1945, 1946, 1947 and 1948, respectively, are false and fraudulent.

Delmas C. Hill, Judge.

Approved: The United States of America, by Eugene Davis, U. S. District Attorney, Attorney for Plaintiff. Llewellyn A. Luce, Walter H. Maloney, Tom Harley, Jr., by Tom Harley, Jr., Attorneys for Defendant.

Entered Aug. 6, 1952.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION FOR BILL OF PARTICULARS—June 12, 1952

No. 8752

Now on this 22nd day of May, 1952, this matter came on to be heard on the defendant's motion for an order requiring the plaintiff, The United States of America, to furnish a Bill of Particular showing wherein the income tax returns filed by him for the Central Theatre Company, Inc., a corporation, for the calendar years of 1945 and 1946, respectively, which are the basis for the first and second counts of the Indictment herein, are false and fraudulent; plaintiff being present by Eugene W. Davis, Deputy United States District Attorney; the defendant being present by his attorneys Llewellyn A. Luce, Walter H. Maloney and Tom Harley, Jr.

The court after examining the files, hearing the argument of counsel, took the matter under advisement.

Now on this 12th day of June, 1952, this matter came on for further hearing and the court finds that said motion should be sustained.

It Is Now, Therefore, Ordered that said plaintiff, The United States of America, be and hereby is ordered to furnish to said defendant a Bill of Particulars showing wherein the income tax returns filed by him for the Central Theatre Company, Inc., a corporation, for the calendar years of 1945 and 1946, respectively, are false and fraudulent.

Delmas C. Hill, Judge.

[fol. 18] Approved: The United States of America, by Eugene W. Davis, U. S. District Attorney, Attorney for Plaintiff. Llewellyn A. Luce, Walter H. Maloney, Tom Harley, Jr., by Tom Harley, Jr., Attorneys for Defendant.
Entered Aug. 6, 1952.

In United States District Court

Bill of Particulars—Filed August 19, 1952

No. 8751

In compliance with the Court's order requiring the plaintiff to furnish the defendant a bill of particulars showing wherein the defendant's income tax returns for the years 1945, 1946, 1947 and 1948, respectively, are false and fraudulent, plaintiff furnishes the following information:

For 1945

Defendant's net taxable income as reported was		$15,064.27,
Whereas the Government proposes to establish that his actual net taxable income was		$39,721.64,
An increase of		$24,657.37,
This increase is made up of the following items:		
Unreported dividends from Central Theater Co., Inc.	$3,508.69	
Unreported net income from theaters & concession	$21,148.68	
Total Unreported Net Income		$24,657.37

The unreported net income from theaters & concessions is computed as follows:		
Total receipts from theater operations and concessions		$128,776.15
Less: Allowable expenses	$92,664.30	
Depreciation allowable on equipment	$4,500.00	
Total allowable expenses and depreciation		$97,164.30
Actual net taxable income from theater operation and concessions		$31,611.85
[fol. 19] Less net taxable income from theater operation and concessions reported on the return		$ 10,463.17
Additional net income from theater operation and concessions		$ 21,148.68

For 1946

Defendant's net taxable income as reported was		$ 18,284.69,
Whereas the Government proposes to establish that his actual net taxable income was		$40,010.45,
An increase of		$ 21,725.76
This increase is made up of the following items:		
Unreported dividends from Central Theater Co., Inc.	$ 3,245.00	
Unreported rent	$ 1,200.00	
Unreported net income from theaters & concessions	$ 17,280.76	
Total Unreported Net Income		$ 21,725.76

The unreported net income from theaters & concessions is computed as follows:		
Total receipts from theater operations and concessions:		$163,297.88
Less: Allowable expenses	$134,185.48	
Depreciation allowable on equipment	$ 3,339.37	
Total allowable expenses and depreciation		$137,524.85
Actual net taxable income from theater operation and concessions		$ 25,773.03
Less net taxable income from theater operation and concessions reported on the return		$ 8,492.27
Additional net income from theater operation and concessions		$ 17,280.76

[fol. 20] For 1947

Defendant's net taxable income as reported was		$ 9,695.80,
Whereas the Government proposes to establish that his actual net taxable income was		$ 37,560.92,
An increase of		$ 27,865.12
This increase is made up of the following items:		
Unreported dividends from Central Theater Co., Inc.	$ 15,720.00	
Unreported rents	$ 2,900.00	
Unreported net income from theaters & concessions	$ 9,245.12	
Total Unreported Net Income		$ 27,865.12
The unreported net income from theaters and concessions is computed as follows:		
Total receipts from theater operations and concessions:		$142,850.67
Less: Allowable expenses	$131,187.07	
Depreciation allowable on equipment	$ 3,403.65	
Total allowable expenses and depreciation		$134,590.72

Actual net taxable income from theater operation and concessions	$ 8,259.95
Less net taxable income from theater operation and concessions reported on the return	$ (985.17)
Additional net income from theater operation and concessions	$ 9,245.12

For 1948

Defendant's net taxable income as reported was		$ 60,868.53,
Whereas the Government proposes to establish that his actual net taxable income was		$ 82,027.15,
An increase of		$ 21,158.62
This increase is made up of the following items:		
Unreported dividends from Central Theater Co., Inc.	$ 10,300.00	
Unreported rents	$ 557.21	
[fol. 21] Unreported net income from theaters and concessions	$ 10,301.41	
Total Unreported Net Income		$ 21,158.62

The unreported net income from theaters and concessions is computed as follows:

Total receipts from theater operations and concessions:		$153,017.72
Less: Allowable expenses	$129,544.20	
Depreciation allowable on equipment	$ 3,795.53	
Total allowable expenses and depreciation		$133,339.73
Actual net taxable income from theater operation and concessions		$ 19,677.99
Less net taxable income from theater operation and concessions reported on the return		$ 9,376.58
Additional net income from theater operation and concessions		$ 10,301.41

The United States proposes to offer proof, in addition to the above, that the unreported income for the years in

question set out above, are substantiated by the net worth and expenditures method of computing tax liability.

Eugene W. Davis, United States Attorney for the District of Kansas, Topeka, Kansas, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

BILL OF PARTICULARS No. 8752—Filed August 19, 1952

In compliance wtih the Court's order requiring the plaintiff to furnish the defendant a bill of particulars showing wherein the defendant's income tax returns for the years 1945 and 1946, respectively, are false and fraudulent, plaintiff furnishes the following information:

[fol. 22] For 1945

The United States proposes to prove the charges contained in Count 1 of the Indictment through the net worth and expenditures method of computing tax liability.

The Corporations net taxable income as reported was		$ 4,633.56
Whereas the government proposes to establish that corporation's actual net taxable income was		$16,884.87
An increase of		$12,251.31
This increase has been computed as follows:		
Earned Surplus 12-31-45	$30,145.81	
Earned Surplus 12-31-44	$20,868.42	
Net Increase in Earned Surplus	$ 9,277.39	
Add: Dividends $6,479.73		
Federal Income and declared value excess profits tax paid in 1945 on 1944 Income $1,127.75		
	$ 7.607.48	
Net taxable income	$16,884.87	
Net taxable income reported	4,633.56	
Unreported taxable income	$12,251.31	

For 1946

The Corporation's net taxable income as reported was		$ 5,198.93,
Whereas the government proposes to establish that the actual net taxable income was		$ 13,197.44,
An increase of		$ 7,998.51
This increase has been computed as follows:		
Total receipts of Corporation from theater operations and concession sales		$143,902.19
Less: Allowable expenses	$127,500.88	
Depreciation	$ 3,203.87	
[fol. 23] Total Allowable Expenses and Depreciation		$130,704.75
Actual net taxable income from theater operations and concessions		$13,197.44
Net income reported on the return		$5,198.93
Additional net income from theater operations and concessions		$7,998.51

The United States proposes to offer proof, in addition to the above, that the unreported income for the year of 1946 set out above, is substantiated by the net worth and expenditures method of computing tax liability.

Eugene W. Davis, United States Attorney for the District of Kansas. Robert H. Bingham, Assistant United States Attorney for the District of Kansas Attorneys for Plaintiff.

In United States District Court

Motion to Dismiss—Filed January 12, 1953

Comes now the above named defendant, after having obtained leave of Court, and respectfully moves to dismiss the indictment found against him because the case was not presented to the Grand Jury by the United States attorney pursuant to the direction of the Attorney General of the

United States or the Department of Justice, as required by Executive Order No. 6166, Section 5 and as provided by Circular Letter No. 2431, dated August 10, 1933, addressed to "All United States Attorneys" issued for the Attorney General of the United States in compliance with said Executive Order.

Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems,
By W. D. Jochems, Attorneys for Defendant.

[fol. 24] An identical motion to dismiss was filed in case No. 8752.

In United States District Court

Plaintiff's Exhibit 1.

Affidavit.

Now comes Charles S. Lyon, who upon his oath deposes and says:

(1) That he is the Assistant Attorney General in charge of the Tax Division of the Department of Justice, Washington, D. C., and has continuously held that position since October 2, 1952;

(2) That it is the duty and responsibility of the Tax Division of the Department of Justice to supervise and control all matters relating to criminal proceedings arising under the internal revenue laws, except those pertaining to liquor taxes, as authorized by Executive Order 6166, June 10, 1933 (5 P.S.C., 1946 ed., Sec. 124-132);

(3) That recommendations for prosecution for alleged violations of the internal revenue laws are normally received from the Bureau of Internal Revenue by the Tax Division in Washington, D. C., but as a matter of administrative convenience in some instances cases are also referred directly to grand juries and United States Attorneys without prior review and consideration by the Tax Division;

(4) That there is no statutory requirement that cases be referred to the Tax Division in Washington, D. C., prior to institution of criminal proceedings;

(5) That there is no statutory requirement that accused persons be allowed a conference or hearing with the officials

of the Department of Justice in Washington or in the office of the United States Attorney prior to institution of criminal proceedings;

(6) That no official rules or regulations have been promulgated by the Department of Justice that accused persons be permitted a hearing or conference prior to institution of criminal proceedings, and when such conference or hearings [fol. 25] are held they are granted as a matter of grace and not of right.

Further affiant sayeth not.

Charles S. Lyon.

Signed and sworn to before me this 19th day of January, 1953.

Edgar M. Ford, Notary Public. (Seal)

Marked for identification Jan. 21, 1953.

In United States District Court

Defendant's Exhibit A

United States Department of Justice, Washington 25, D. C.

January 31, 1952.

ENS:BK:11
5-29-387

Llewellyn A. Luce, Esq., 937 Munsey Building, Washington 4, D. C.

Re: O. F. Sullivan, Central Theatre Co., Inc., Wichita, Kansas

Dear Mr. Luce:

We have on file your request that a conference be granted you in the event the above-named case is referred to this office with the recommendation for criminal prosecution.

This is to advise that we are now in receipt of a recommendation by Acting Regional Counsel Joseph B. King that criminal proceedings be instituted against O. F. Sullivan for individual income tax evasion as to the years 1946, 1947 and 1948, and for corporate evasion as to the year 1946.

This case has been assigned to Mr. Ben Kohler, Jr., of my staff. In view of the fact that the first year involved [fol. 26] is 1946 a conference in this matter cannot be held until after the present March 15th statutory deadline. As soon as possible after March 15th, however, a conference date will be proposed.

Sincerely yours, for the Attorney General, Ellis N. Slack, Acting Assistant Attorney General.

Marked for identification Jan. 21, 1953.

In United States District Court

Narrative Statement of Transcript of Proceedings of April 8, 1953—Filed September 25, 1953

Appearances:

Eugene W. Davis and Robert H. Bingham for the plaintiff-appellee. Llewellyn A. Luce, Tom Harley, Jr. and W. D. Jochems for the defendant-appellant. Defendant was present in person.

The cases, Nos. 8751 and 8752, had previously been consolidated and a jury had been empaneled. Defendant came forward and Mr. Luce, counsel for defendant, stated that Mr. Sullivan desired at that time to withdraw his plea of not guilty as to Count 1 of the indictment and with the permission of the Court to plead, in lieu of not guilty, nolo contendere in case No. 8751 and made the same statement with reference to Count 3 of the indictment in said case; that with reference to case 8752 defendant desired to withdraw his plea of not guilty as to Count 1 and with the permission of the Court to enter a plea of nolo contendere.

Mr. Davis, counsel for plaintiff, stated that he knew of no reason why the plea of nolo contendere should not be accepted by the Court. Upon inquiry by the Court counsel for plaintiff stated that he did recommend acceptance of the plea of nolo contendere and that he had authority from the Department of Justice in Washington to do so. The Court then stated that defendant would be permitted

to withdraw his pleas of not guilty to Counts 1 and 3 of [fol. 27] Case 8751 and to Count 1 in Case 8752 and inquired of the defendant whether he desired the plea of nolo contendere to be entered to said counts. Defendant replied in the affirmative. The Court accepted the plea of nolo contendere upon the recommendation of the District Attorney and the Department of Justice. The Court then stated that sentence would be deferred; that he wanted a complete pre-sentence report by the probation office. Thereupon May 5, 1953, was set for the date of sentence. Counsel for the Government then stated that it would not be necessary for the witnesses who had been subpoenaed to appear and the trial which had been scheduled for the following Tuesday could now be called off. Discussion was then had between Court and counsel as to disposition of the remaining counts. Mr. Luce, counsel for defendant, stated that the jury would have to be excused and that it was with the consent of the defendant.

"The Court: I think the defendant probably has been in jeopardy so far as those counts are concerned.

"Mr. Jochems: That is why we are stating it is done with our consent, Your Honor. If it is done with our consent, we can't raise the question of jeopardy, as I understand it. In other words, we want to be fair about that."

Thereupon Counts 2 and 4 in Case 8751 and Count 2 of Case 8752 were dismissed on motion of plaintiff.

In United States District Court

Transcript of Proceedings of May 26, 1953—Filed June 17, 1953

Hon. Delmas C. Hill, Judge, Presiding.

[fol. 28] The Court: Call the next case.

The Clerk: Numbers 8751 and 8752, United States vs. Odom Farrell Sullivan.

Mr. Luce: The defendant is in Court, Your Honor, and counsel are present.

The Court: You are sentencing in both cases, is that correct?

Mr. Davis: I believe that is correct, Your Honor.

The Court: Mr. District Attorney, do you desire to make a statement about the case at this time?

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Davis: Perhaps I should, Your Honor. On April the 8th, Mr. Sullivan, together with his attorneys appeared before the Court in Wichita, Kansas, and at that time entered a plea of Nolo contendere to Counts 1 and 3 in Indictment Number 8751 and to Count 1 in Indictment Number 8752.

These are two income tax cases and perhaps I should summarize the two cases and the facts for Your Honor. Counts 1 and 3 of the individual income tax case—that is 8751—the first case, in substance, charged as follows: That Mr. Sullivan did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the government for the calendar year 1945, by filing with the Collector a return which stated that his net income for the calendar year 1945 was $15,064.27, and that the tax owing thereon was $4,505.36. The indictment in that Count alleged that actually, as Mr. Sullivan then and there well knew, his net income for the year 1945 was $39,721.64, upon which income he owed the government a tax of $19,511.85.

Your Honor will notice that the tax evaded for the year 1945 was, roughly speaking, fifteen thousand dollars.

[fol. 29] I shall not go into the details of the second count or the fourth count, which were dismissed by the government following the pleas of Nolo contendere and acceptance of Counts 1 and 3, acceptance of pleas on Counts 1 and 3, except to state that Count 2 disclosed a tax evaded of about twelve thousand dollars; Count 3 disclosed a tax evaded of about fourteen thousand dollars, and the fourth count, tax evaded of about eleven thousand dollars.

Perhaps I should also summarize, very briefly, Your Honor, the indictment in Docket Number 8752. The first count is the one to which a plea of Nolo contendere was entered and was accepted. It charges that on March 14, 1946, Mr. Sullivan, who was the president of the Central

Theatre Company, a corporation, did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation, of which he was president, for the calendar year 1945, by filing with the Collector a false and fraudulent return reporting that the net income of the corporation for that calendar year was forty-three hundred and some odd dollars and that the net income for declared-value excess-profits tax computation was the sum of $4,633.56—that is applicable to corporations only—and the amount of income tax due thereon was $1,081.30 and the declared-value excess-profits tax was $446.63. The government alleged and claimed, and we have evidence to show, that Mr. Sullivan, as he then and there well knew, the income of the corporation, the Central Theatre Company for that year, was actually $16,884.87 and the net income of the corporation which it owed to the government was thirty-two hundred dollars and a declared-value of excess-profits tax of over two thousand dollars. So much for the pattern.

The second count of the indictment, of that indictment, as far as the corporation was concerned, was dismissed upon the Court's acceptance of the other plea.

Now, Your Honor, without going into too much detail, I perhaps owe a duty to the Court to give the background of the investigation somewhat of Mr. Sullivan and his history taxwise.

Mr. Sullivan has lived in Wichita for quite a number of [fol. 30] years. He is in the theater business. In Wichita he owned the Civic, the Crawford, the West theaters, and also during the tax years in question, which were 1946 to 1948, 1945, 1946, 1947 and 1948, in the main; also the 54 Drive-In Theater, 54 and 81 Drive-In Theaters, or five theaters in and around Wichita. Also Mr. Sullivan owned and operated a drive-in theater at Muskogee, Oklahoma and a drive-in theater at Oklahoma City.

So he was an operator in the theater business of considerable activity. I think that makes one, two, three, four, five—seven theaters and it was all during this period of time. He has acquired other theaters since 1948 but that has nothing to do here with this.

Now, during the year 1949, to show the extent of Mr. Sullivan's operations, and I want to be accurate about this,

he promoted the erection and construction of an ultra modern four hundred thousand dollar theater known as the Crest and to aid in financing the operation of that $125,000 in first mortgage leasehold bonds were issued. The bonds were secured by the personal guarantee of Mr. Sullivan and his wife, who are substantial people.

Now, Your Honor, in 1948 the tax difficulties began to become apparent. An investigation was instituted I think in the latter part of the year 1948 and it is rather noteworthy, Your Honor, that for the calendar year 1948 Mr. Sullivan obtained an extension of time after the investigation started and for the year 1948 Mr. and Mrs. Sullivan reported a joint income of $60,868.53, which is noteworthy in this respect, Your Honor: Because that was by far the greatest income that was reported for any year since clear back to the year 1941. Actually it exceeded the joint incomes of Mr. and Mrs. Sullivan for any three of the previous years. Actually the income of Mr. and Mrs. Sullivan for the three previous years was, approximately, sixty-one thousand dollars, so the actual income, so the income he reported for that one year, after the investigation started, was about sixty thousand dollars, or several times what had been reported. That is not all. The investigation showed that actually Mr. Sullivan's income for 1948 was about $138,000, so there was unreported for [fol. 31] that particular year somewhere in the neighborhood of $77,000. I mention this to establish a pattern, Your Honor, starting back for several years; 1941, according to his return, he reported $5,400, unreported $22,000; 1942, $8,600, actual $16,000; 1943, $5,600 reported, unreported fifty-eight thousand; 1944, per return, thirteen thousand, unreported $40,000; 1945, reported fifteen thousand, actually there was unreported twenty-seven thousand, and so on down the line and for the period from 1941 to 1948, Your Honor, including the figures that I have mentioned, the government feels that it has figures to establish that there was unreported income of the terrific total of $319,000 and a deficiency in tax for those particular years of $186,000. So Your Honor can see that the figures run into a rather large amount of money.

I want to say this: I am not unkindly and I want to be fair but this, moneywise, Your Honor, is the biggest

income tax fraud case that there has been in the District of Kansas to my knowledge since I have been in the U. S. Attorney's Office, some ten and one-half years.

Now, Mr. Sullivan, as I indicated awhile ago, is a man of considerable means and importance. He is an educated man and think this is a fair statement: That the tax difficulties here just can't be chalked up to oversight or a man that doesn't know what taxes are all about, because Mr. Sullivan is an educated and a skilled man, he is somewhat of an accountant.

He graduated with a degree of Bachelor of Science in Education from the University of Kansas; following his graduation he became a traveling student, secretary, and was employed later by the Oklahoma A. & M. College at Stillwater where he was a student secretary. After leaving Stillwater he began to get in the theater business and has made a tremendous success of it.

Down in Wichita, Kansas, he was a public official down there, served a four year term as a City Commissioner from 1941 to 1945, and was, as a Commissioner, they take their turns, and he served as Mayor of Wichita for one year, from 1942 to 1943.

[fol. 32] Now let me say this, Your Honor, and again not unkindly but then I want to be factually correct: Beginning with the investigation and throughout the Revenue Agent's report discloses to us that there was a reluctance on the part of Mr. Sullivan to co-operate with the Revenue Agents. They would come up to see him and while he didn't completely give them the brush-off it was plain to them that his attitude to them was unfriendly and he wasn't open and above-board in his furnishing information to the Revenue Agents. Our reports show that when the Revenue Agents would come up to see him to ask him many questions that they would ask to see a certain item to verify it from his books, as an example, and he would pull open a drawer and look in it, try to find the answer to that one, he would tell them the answer and shove the book back in the drawer and close the drawer. And it was a painstaking, teethpulling, type of endeavor, according to the report of the agents, to secure facts.

The deficiencies were, in reporting income, were handled in a rather odd manner. As I said awhile ago, the principal

business was the corporation. Mr. Sullivan, according to the agent's report, and it is verified by a detailed study of them, had a practice of engaging in what might be called some skim-offs. He operated the Central, the Civic Theater in Wichita, twice a week from the receipts of the Civic Theater, which was his theater, there was deposited to an account in currency in an account in the name of O. F. and Mary Jane Sullivan in the Fourth National Bank. These deposits were made by Mr. Sullivan's direction by the manager.

Now those so-called skim-offs, a hundred dollars twice a week, Your Honor, were not reported as income by the corporation. The government didn't know about those. They weren't included as income. Where they came from, we know that they came from the theatre operations either from the sale of concessions or from the sale of tickets, but you can't tell which portion or what proportion came from each, but we do know that they came from the joint operations of the concessions and the ticket sales.

In like manner, a hundred dollars twice a week skim-
[fol. 33] offs from the receipts of the Crawford Theatre, which was operated by the Central Theatre Company, to an account in the name of Mrs. Sullivan in the Union National Bank. Those deposits were made by theatre managers on Mr. Sullivan's directions. Among the managers was Mr. Kenneth Gaston, one of the employees. That has been verified by him. The receipts were not reported as income by either the corporation or by Mr. and Mrs. Sullivan.

Now that went on for a period of some years, Your Honor, from 1946 to some time in 1948, roughly speaking, four years. I mention that as a pattern because there was a persistence, siphoning off money that came from somewhere. That should have been reported either as a corporation profit or as an income by Mr. and Mrs. Sullivan.

Now when the agent began to go down to see him about it, as I mentioned awhile ago, Mr. Sullivan was a little bit reticent, reluctant, to give the Revenue Agents information. They naturally inquired about: Well, what about your bank accounts; we want to check them. And said: How many bank accounts do you have? He said, "Two," and told them one at the Fourth National Bank for the

Civic and West theatres and one at the First National Bank in the name of Mrs. Sullivan, Mary Jane Sullivan.

Subsequent investigation disclosed, Your Honor, that actually he had at least ten more—I believe actually he had twelve and in addition to that four building and loan company accounts. The Revenue Agent's report said that and I have one of the Agent's statements here and I have no reason to believe it is not true. Mr. Walker, one of them, is now dead. Later on they discover that Mr. Sullivan had additional bank accounts. "Did Mr. Sullivan later accompany you and Revenue Agent Walker to various financial institutions to inform the officers regarding bank accounts? He did." And then went on to explain where some of them were and made the statement: "To the best of your memory did the original statement contain all of the known bank accounts" and in that connection I would like to call Your Honor's attention to something that I think is significant. Mr. Sullivan was asked to state in his own handwriting during the investi- [fol. 34] gation in January of 1949, shortly after it started, concerning bank accounts: "This is to certify that the following bank accounts are the only bank accounts in my name or any member of my family's name from January 1946 to and including this date." That is January, 1949.

I think he listed ten to begin with. Then later on, at some subsequent time, he asked if he could not amend that and then he inserts on the original statement two other bank accounts, one, an additional one in the name of Mary Jane Sullivan in the Fourth National Bank and another one, still another one in still a different bank which never had shown up in the picture before, the account of O. F. Sullivan over in the Kansas State Bank. There were accounts in the Fourth National Bank, First National, Union National, Kansas State, the Commercial National Bank in Muskogee, Oklahoma, as well as the building and loan company accounts that I have previously mentioned.

Money-wise, Your Honor, this totals up about as follows: The government claims and I believe this is an accurate summary, on Mr. Sullivan's individual income taxes that there were deficiencies of $186,899.62; corporate defici-

encies, $57,679.29; gift taxes, which we think were evaded, $17,422.51, or a total of $263,001.42.

Now, of course, the government is interested in the penalties, on those but that is a matter that will concern other than the criminal case, in part, but on that amount the penalties, if the government figures are correct, penalties accrued to the extent of $140,000. The government claims as of now that he is actually in debt to the United States in a sum slightly in excess of $400,000. So I repeat, this is, money-wise, a pretty substantial amount.

I believe I have nothing further. I think, Your Honor, that that is a fair summary of the factual situation.

Mr. Luce: May it please the Court, I would like to make a few remarks if I may in behalf of the defendant. My statement will be very brief and then Judge Jochems would like to make a few remarks.

Now let me just briefly review the history of this case, if [fol. 35] Your Honor please. We are here on Indictment Number 8751, on a plea of Nolo contendere. The other two counts having been dismissed by the United States Attorney with the approval of the Department of Justice. We are here on Indictment Number 8752 on one count, the other count having been dismissed by the United States Attorney with the approval of the Department of Justice.

Now just a word in regard to these amounts that are involved in the civil liability. As I add up the bill of particulars the amounts involved in these counts of these indictments run, on the individual case, about twenty-one thousand additional income. On the '47 case, the other remaining count, about nine thousand additional income, total thirty thousand. And the additional income claimed on the corporation twelve. Now those are income amounts, not taxes.

Now it is true that there are civil liabilities in which the government claims substantial taxes as outlined by the United States Attorney but these civil liabilities are not here before us. Those civil liabilities, if any, if the cases are not settled, will have to be decided, as Your Honor knows, by the Tax Court of the United States, whether they run from 1943 to 1948 or whatever it may be that the Department has claimed. We haven't got a ninety-day

letter or a thirty-day letter up to the present time outlining those contentions but just a brief history of the case.

Now when the matter came up the investigation of the agents, about the year 1950, came to a climax, we requested a conference in Washington. At that time we had this conference before the Chief Counsel's office and the defendant went back to Washington with two Certified Public Accountants and was represented by counsel, in which we pointed out, although we didn't know the items, pointed out what we thought were the errors involved. We think that at the end of the net worths period, apparently at that time it was computed on net worth, that we pointed out errors in computation in income, not taxes, in excess of $139,000.

Well, as a result of that, the case was sent back to the field, or sent back from Washington to the field for further consideration. It was here in the field for approximately [fol. 36] a year. It reached the Department of Justice, as I recall, in about a year, a year later, or a year and a half later. While pending in the Department of Justice this indictment came on. From there we proceeded until we reached the present status of the case, after filing motions. And this spring, as counsel has indicated, with the recommendation of the United States Attorney and with the approval of the Department of Justice, we entered our plea of Nolo contendere to these three counts, which Your Honor accepted in view of the recommendation of the United States Attorney and the concurrance of the Department of Justice. The other three counts were, as counsel has stated, dismissed by the United States Attorney with the approval of the Department of Justice.

Now I just wanted to confine my remarks to a statement of the case. Judge Jochems will continue on behalf of the defendant but I do wish to point out that these large figures which the United States Attorney has mentioned are civil liability figures, not indictment figures, and whether or not there is any civil liability or any penalties owing is, of course, a question for the Tax Court of the United States. I thank you.

Mr. Jochems: May it please the Court: Of course, I think it is needless to say that so far as these figures which have been set up, there is a very rigid contest on the

part of the defendant as to their correctness. The fact that they have been set up and charged against him doesn't constitute proof that he actually owes that amount of money and of course that is a matter of which we expect to do our utmost to convince the government later that we do not owe that much money.

Now it happens that there are two corporations which Mr. Sullivan had, one known as the Starlight Amusement Company, which operated open air theatres or drive-in theatres in Oklahoma and the other one known as Amusement Enterprises, which operated two open air theatres in Wichita. On neither of those corporations did they charge any deficiencies. Then there is another thing that is significant about this. We deny that he didn't co-operate with [fol. 37] these agents, we think he did, from what information we have.

There is a thing that we think is significant about this and that is that it isn't the usual case where a man hid out and has it some place else in a lock box or out some place hidden. He had his money in bank accounts and I think perhaps the worst trouble that is perhaps the greatest fault of our client was due to the fact that he was expanding rapidly in his activities and was going from one enterprise into another and he overlooked a great many of the details and didn't keep the books in the form and in the manner that a high class accountancy firm would keep them and so the books were in such shape that it was rather difficult and is still difficult to compute some of the figures as to what he really owes.

As I say, I think his greatest fault was that he was so busy in going ahead and expanding enterprises that he didn't keep as close an account on detail as should have been done in order to have things in shape so that when they did come in to check up the thing could have been checked out properly.

Now I did what I could after I came into this case to try to familiarize myself with both the claims of the government and of the defendant, and it was my judgment that while there is probably some deficiency in the tax, that there is no actual fraud on the part of the defendant; that he had no fraudulent scheme or no intention to commit

fraud and, as I say, I think he drifted into it through being too busy on the bigger things and not looking after the details.

Now of course we felt that we had a reasonably good chance to acquit this defendant, but there always comes a time when a lawyer is confronted with what he thinks is the best thing to do for the interest of his client, and of course it meant that we had to take the gamble of what a jury would or wouldn't do, after what appeared to be possibly a prolonged trial of a week to ten days duration, and after counseling over the matter we decided that it would be better to enter the plea which we did enter.

Now, I can say this for my friend Mr. Sullivan, and [fol. 38] when I speak to you here today, I am speaking to you in his behalf not so much as a client but as a friend of a good many years. I knew Mr. Sullivan when he first came to Wichita. He was a man of boundless energy, a man who really got out and did things. When he first started in Wichita he started a little theater over in a store building on the west side. For about fifteen years he operated his own moving picture machine and his wife was the cashier. He worked hard. He became active in the civic affairs of the city, became interested in civic and club work, was president of one of these and I think district governor. He became active in the Chamber of Commerce. He became very active in another organization known as the Business Men, the Independent Business Men's association. He was on the Board of Directors for a number of years for the Y. M. C. A.; he was on the Board of Directors of a building and loan association down there; he has been active and been a member of the Board of Directors for the Community Chest for a number of years and active in its work. There has hardly been a drive of any kind for funds that this man hasn't worked in connection with it and it is through that that I met him some years ago.

Now he was City Commissioner of our city for four years, being elected by the people, and re-elected. He became Mayor in the course of that service and served with credit to the city, served with credit to himself. He was highly regarded in the town and if we had tried the case we would have been able to have produced character

witnesses to testify for this man, and produced them from among the best citizens in Wichita who would have testified to his good character.

Now he has done, as I say, a yeoman's service in looking after the better interests of the city of Wichita. One of the things he did when he opened his Crest Theater out on the hill he donated the receipts of the opening to the Wichita Child Guidance Center, and a fund of five thousand dollars was thereby created. He has always been in the forefront in donating to worthy causes. His theaters have been open at all times free of charge to the underprivileged children.

[fol. 39] Now, if there is such a thing as a man having been a good citizen of Wichita I say that O. F. Sullivan has been that good citizen. If he hasn't been a good citizen there are no good citizens in Wichita.

Now I think when it comes to a case like this, where there is a sharp dispute, and has been a sharp dispute right along as to whether he owes the amount that they are claiming and the differences that there exists between the figures as between accountants, that a man's record ought to be taken into consideration. This man has a fine record of citizenship. He has a record, too, where he has never been in trouble before. He has never been in any difficulty, never has had any criminal offenses or charges placed against him.

Now under the circumstances he has been a hard working man and, as I say, I think his big offense, if any, has been in the fact that he was going ahead and expanding and giving too much attention to the big things and not enough attention to the matter of bookkeeping detail, so, I say to Your Honor honestly and conscientiously, that I believe this is a case where the ends of justice would be met and served if Mr. Sullivan is placed on probation for whatever sentence Your Honor sees fit to impose upon him. We bespeak in his behalf for a reasonable sentence, possibly a reasonable fine, and as to any sentence that may be imposed we feel that he should be placed under probation.

The man's health is not good, as is shown by a medical report which was submitted to the Probation Officer. He lacks a good deal of being in good health at the present

time and in view of his good record of citizenship, in view of the fact that he has never had any trouble, we respectfully urge that he be placed under probation. I thank you very much.

The Court: Odom Farrell Sullivan, do you know of any reason why the judgment and sentence of the Court shouldn't now be pronounced upon you in each of these cases?

The Defendant: No, sir. I would like to make a statement, Your Honor.

The Court: You may.

[fol. 40] The Defendant: I have tried conscientiously all my life to live to be an upright citizen. For a quarter of a century I have tried to serve the best interests I could to the Community in Wichita, Kansas.

I appreciate the courtesies extended to me by this Court and my legal counsel; I appreciate the courtesies extended to me by the District Attorney in the handling of this case, although I resent very much some of the statements that he made. We are not trying the case so I won't go farther into that.

Out of consideration, Your Honor, for my good wife and two children, I earnestly and respectfully beseech clemency.

The Court: Very frankly, I will say to you, gentlemen, that this is the most aggravated income tax case that has been before me since I have been on the Bench.

On Count 1 of the indictment in Case Number 8751 it is the judgment and sentence of the Court that you be confined to the custody of the Attorney General for a period of three years, and that you pay a fine in the amount of five thousand dollars.

On Count 3 of that indictment I will suspend the imposition of sentence for a period of three years, after you have served the sentence on Count 1. On Count 1 of the indictment in Case Number 8752 it is the judgment and sentence of the Court that you be confined to the custody of the Attorney General for a period of three years. That sentence, however, will run concurrently with the sentence imposed on Count 1 of the previous indictment, and you will pay a fine on that count in the amount of eight thous-

and dollars. You will pay the costs in both cases and probation will be denied.

Mr. Jochems: May we have a sixty day stay to get matters in shape, Your Honor, to let him get his affairs in shape?

The Court: I think thirty days is sufficient.

The Defendant: Your Honor, may I make another statement?

[fol. 41] The Court: No. I have imposed sentence and that is the end of the case.

Mr. Jochems: Thirty days then, Your Honor?

The Court: Thirty days.

The Defendant: You are completely misled, Your Honor.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT No. 8751—May 26, 1953

On this 26th day of May, 1953 came the attorney for the government and the defendant appeared in person and by counsel Llewellyn A. Luce, W. D. Jochems and Tom Harley, Jr. at Kansas City, Kansas.

It is adjudged that the defendant has been convicted upon his plea of nolo contendere to counts 1 and 3 of the offenses of willfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him for the calendar years 1945 and 1947 by filing and causing to be filed with the Collector of Internal Revenue for the District of Kansas false and fraudulent income tax returns for said calendar years, in violation of 26 USC 145(b), as charged in Indictment of 4 counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years, and pay a fine in the sum of $5000.00 on count 1, and

pay the costs of this action; on count 3 imposition of sentence is suspended for a period of three (3) years, after the defendant has served the sentence on count 1.

It is adjudged that counts 2 and 4 are dismissed on motion of the United States Attorney. Stay of execution for 30 days is hereby granted.

[fol. 42] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved: Eugene W. Davis, United States Attorney.
Delmas C. Hill, United States District Judge.

Entered May 29, 1953.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT No. 8752—May 26, 1953

On this 26th day of May, 1953 came the attorney for the government and the defendant appeared in person and by counsel Llewellyn A. Luce, W. D. Joebens and Tom Harley, Jr. at Kansas City, Kansas.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere to count 1 of the offense of willfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by a corporation, of which he was president, for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent tax return for said calendar year, in violation of 26 USC 145 (b), as charged in Indictment of 2 counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on count 1, to run concurrently with the sentence this date imposed on count one of case No. 8751, and pay

a fine in the sum of $8000.00 and the costs of this action.

It Is Adjudged that count 2 is dismissed on motion of the United States Attorney. Stay of execution is granted for 30 days.

[fol. 43] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved Eugene W. Davis, United States Attorney.

Delmas C. Hill, United States District Judge.

Entered May 29, 1953.

In United States District Court

Motion in Arrest of Judgment—Filed May 29, 1953

The defendant moves the Court to arrest the judgment for the reason that this Court is without jurisdiction of the offense.

In support of this motion, it is shown to the Court that these cases were not presented to the grand jury by the United States Attorney pursuant to the direction of the Attorney General of the United States or the Department of Justice as required by Executive Order No. 6166, Section 5, by Circular Letter 2231 dated August 10, 1933, and by 26 U.S.C. 3740.

Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems, By Tom Harley, Jr., Attorneys for Defendant.

In United States District Court

Motion to Set Aside Judgment of Conviction and to Permit Defendant to Withdraw His Plea of Nolo Contendere—Filed May 29, 1953.

Comes now the above named defendant and respectfully moves the Court to vacate and set aside the judgment of conviction and sentence heretofore imposed on the 26th day of May 1953 in the above entitled actions and to permit

defendant to withdraw his plea of nolo contendere previously entered in said actions for the following reasons:

[fol. 44] 1. Because of manifest injustice to the defendant.

2. Because defendant entered his plea of nolo contendere under the mistaken belief that he would obtain probation, which mistake was induced in part by acts and statements of the United States District Attorney.

3. Because of misconduct of the United States District Attorney.

Evidence in support hereof will be offered on the hearing of this motion.

Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems,
By W. D. Jochems, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S AMENDED MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND PERMIT DEFENDANT TO WITHDRAW HIS PLEA OF NOLO CONTENDERE—Filed June 12, 1953.

Comes now Odom Farrell Sullivan, the defendant in the above entitled causes, and moves the court to vacate and set aside the judgment and sentence entered in said causes on the 26th day of May, 1953 and for leave to withdraw his plea of nolo contendere entered therein on the 8th day of April, 1953.

The grounds for this motion are:

1. Defendant insists that he is not guilty of any of the counts in the indictments involved in the above entitled cases.

2. Defendant, although innocent, entered the aforesaid pleas because he was lead to believe and did believe at the time of the entry thereof and up to the time when sentence was imposed upon him, that he, the said defendant, would not be committed to serve any period of time in the Federal Penitentiary, or elsewhere, but that on the contrary he, the said defendant, would receive a substantial fine and suspended sentence and be placed upon parole.

[fol. 45] The defendant offers the following matters in support of this motion:

1. Your defendant respectfully states that the above entitled causes were regularly set for hearing in the city of Wichita, Kansas; that on the night of April 5, 1953, Llewellyn A. Luce of Washington, D. C., one of the counsel employed by defendant to represent him in the above entitled actions, came to the city of Wichita, Kansas, to confer with the local attorneys representing defendant in the above entitled actions, W. D. Jochems and Tom Harley, Jr., in preparation to trying the causes. That said Llewellyn A. Luce was met at the train at approximately 9:30 p. m. of said day by said Tom Harley, Jr. and was driven to the Lassen Hotel in the city of Wichita, Kansas, where said Llewellyn A. Luce had hotel reservations. Mr. Luce registered into said hotel and he and Mr. Harley had been in his room for only a few minutes when they received a call from Eugene W. Davis, United States District Attorney for the State of Kansas, and were invited down to his room. Mr. Luce and Mr. Harley accepted the invitation of Mr. Davis and visited with him in his room for approximately an hour or such a matter.

2. The following morning Monday, April 6, 1953, the defendant appeared in court with counsel and a jury was selected to try cause No. which was then excused by the Court and ordered to report the following Monday. That evening Mr. Luce and Mr. Harley were again contacted by Mr. Davis and invited down to his room. When Mr. Luce and Mr. Harley went into the room of Mr. Davis they were greeted by Mr. Davis and Mr. Robert H. Bingham, an Assistant United States District Attorney for the State of Kansas. After some conversation, Mr. Davis asked Mr. Luce and Mr. Harley why they didn't plead the defendant guilty to two counts, one count in each indictment, and dispose of the matter. Mr. Harley informed Mr. Davis that the defendant would not plead guilty to any of the counts because the defendant had maintained all along, and was still maintaining, that he was innocent of any fraudulent conduct. Mr. Bingham then stated that he was of the opinion that the defendant should enter a plea to three counts and asked if the defendant would enter a

[fol. 46] plea of nolo contendere to three counts if the Government would dismiss the remaining three counts in both cases. Mr. Bingham went on to say that he thought the defendant was subject to Berger's disease. That according to their information defendant's brother had died of the disease and that his sister had to have a leg amputated as the result of said disease and that in his opinion the court would be lenient with anyone of the character and reputation of this defendant who had a medical background such as that. Mr. Davis stated that he had nothing personal against the defendant and from everything that he could learn the defendant was a man of good character, reputation, and very civic minded. That in the courtroom when the jury was being selected he couldn't help but notice the lovely wife of the defendant and his two fine children and that he would hate to see them subjected to the defendant's standing trial. He, too, stated that he was of the opinion that the Court would show leniency to a man of defendant's character and reputation.

After more conversation of the same tenor, Mr. Davis was asked directly if he would recommend probation or suspended sentence on a plea. Mr. Davis said that it was not the practice of the Court to ask him for a recommendation but that he had no objection to probation or a suspended sentence and to be assured he would not oppose probation or suspended sentence and that he would recommend to the Court that a plea of nolo contendere be accepted. After more conversation along these lines, Mr. Luce and Mr. Harley departed stating that they would give the proposition offered by the Government some thought and would let them know.

Mr. Luce and Mr. Harley then returned to Mr. Luce's room where the defendant, W. D. Jochems and the accounts for the defendant were waiting and related to them their conversation with Mr. Davis and Mr. Bingham.

3. The following morning, April 7, 1953, a meeting was had with Mr. Davis and Mr. Bingham by all defendant's counsel at which meeting was discussed the possibility of the Court's accepting the plea of nolo contendere on behalf of the defendant. Defendant's counsel being informed that [fol. 47] Mr. Davis had contacted the Justice Department by telephone and had received its approval of the plea of

nolo contendere by phone but was waiting to have it confirmed by wire.

4. That afternoon, April 7, 1953, Mr. Luce, Mr. Jochems, and Mr. Davis went to see the Honorable Delmas C. Hill in his chambers and discussed with His Honor the proposition made by Mr. Davis to see if His Honor would accept a plea of nolo contendere. That during the conference His Honor stated that it had been his practice in tax cases to insist upon a plea of guilty and not to accept a plea of nolo contendere; that he assumed what counsel for defendant had in mind was that they did not want defendant's rights prejudiced as to his civil tax liability; that it had been his practice that even when a defendant pleaded guilty and he put him on probation, he always made it a condition that the plea was entered without any prejudice to his civil tax liability. The conversations in these two meetings were then related to the defendant by counsel.

In stating the above, relative to the conference with His Honor Delmas C. Hill, no effort is being made to reflect any impropriety on the part of His Honor or that His Honor held out any false hope, or that His Honor in making said remark was implying or indicating to defendant's counsel that the defendant would be probated. However, defendant was lead to believe by his counsel that the remark of His Honor, coupled with the fact that the offer of settlement of the above cases originated with the District Attorney, Mr. Davis, and Mr. Davis' apparent attitude of friendliness and cooperation was a strong indication that the defendant would receive a probated sentence.

5. That on the evening of said day, Mr. Luce and Mr. Jochems met with Mr. Davis and Mr. Bingham in their room at the Lassen Hotel. That during this meeting Mr. Davis again stated, in substance, that he would not be in a position to make a recommendation to the Court relative to the sentence that the defendant should receive for the reason that the Court would not call upon him to do so. He again assured defendant's counsel that he would not oppose probation or a suspended sentence. That he had nothing personal against the defendant and that he was [fol. 48] of the opinion that the Court would show leniency toward the defendant with the character and reputation of this defendant; that considerable more conversation

was had and it was agreed by defendant's counsel and Mr. Davis, subject to the approval of this defendant, that the defendant would enter a plea of nolo contendere to Counts One and Three in Case No. 8751 and Count One of Case No. 8752.

That after considerable discussion and consideration defendant became convinced that if he entered a plea of nolo contendere to the three counts aforesaid that he would receive a probated sentence and would not have to serve time in any penitentiary and that if he had not been so convinced he would never have entered pleas and would have insisted that the cases be tried as originally scheduled.

6. Defendant further says that on the 8th day of April, 1953, at approximately 10 o'clock a. m., he entered a plea of nolo contendere to Counts One and Three in Case No. 8751 and a plea of nolo contendere to Count One in Case No. 8752 and the Government moved to dismiss Counts Two and Four of Case No. 8751 and Count Two of Case No. 8752. The Court accepted pleas of nolo contendere to the aforesaid counts, dismissed the counts as moved by the Government and ordered the jury discharged. The cases were consolidated and the matters passed for pre-sentencing and investigation.

7. That on the 26th day of May, 1953, at Kansas City, Kansas, at approximately 2 o'clock p. m., the above cases came on to be heard for the sentencing of this defendant. Defendant being present in person and by counsel and the Government being represented by Mr. Eugene W. Davis, United States District Attorney for Kansas.

When the defendant went before the Court for sentencing he was still of the belief that he would be fined in a substantial amount and would receive a probated or suspended sentence.

Before rendering sentence, the Court called upon Mr. Davis, United States District Attorney, to explain the cases. When Mr. Davis explained the cases his attitude [fol. 49] changed from friendliness toward and cooperation with this defendant to an attitude of vindictiveness and maliciousness. In Mr. Davis's explanation to the Court he discussed the counts of the indictment which had been dismissed upon his own motion. He went into the claimed civil liability of the defendant for taxes due and stated

that the defendant owed in excess of $450,000.00 in income tax and penalty. He accused the defendant of not cooperating with the Revenue Agents and of syphoning off money from various bank accounts. That Mr. Davis in his explanation of the cases to the Court willfully and maliciously stated and did everything that he could possibly do to prejudice His Honor against the defendant, whereas up to that time he had apparently been friendly toward and considerate of defendant and all of his conversations and actions indicated that he was personally in favor of the defendant being probated or receiving a suspended sentence. That defendant and his counsel were taken utterly by surprise and were in no way prepared to contest the statements and accusations made by Mr. Davis.

That after statement of counsel, the Court imposed judgment on the defendant by sentencing him to the custody of the United States Attorney General for a period of three years on Count One of the indictment in Case No. 8751 and fining him the sum of $8,000.00 on said count and by sentencing said defendant to three years on Count Three of said case to run concurrently with the sentence on Count One and further fined said defendant in the sum of $5,000.00 on Count One of the indictment in Case No. 8752 and sentenced said defendant to the custody of the Attorney General of the United States for a period of three years, said sentence to be suspended. Thereupon, counsel for defendant requested sixty (60) days extension in order that said defendant might make some arrangements and the Court allowed him thirty (30) days from the date of sentence, all of which was wholly contrary to defendant's belief when he entered, and permitted to remain, his pleas of nolo contendere as well as a surprise to him, because of the information which had been given to him by his counsel and upon which he relied and from which he was not dissuaded by any information given him.

[fol. 50] 8. Defendant says that he is not guilty of any of the charges set forth in the indictments in the above cases and that he entered his pleas of nolo contendere because of the belief that he would be granted probation or receive a suspended sentence and that the disposition of the criminal cases would be a valuable aid to him in

effecting settlement of the Government's claim of money due it for unpaid income taxes.

9. Defendant says that by reason of the foregoing he was mislead and was the victim of a mistake.

10. Defendant further says that by reason of the matters herein set forth, a gross injustice has been inflicted upon him and that he has been deprived of his constitutional right to a trial and he has been deprived of his liberty without due process of law in violation of the Sixth and Fifth Amendments to the Constitution of the United States; and that the defendant can be relieved of this injustice, mistake, misapprehension, and deprivation of his Constitutional rights only by the Court's allowance and granting of the above motion.

11. Defendant emphasizes the statement heretofore made that he is not guilty of any of the counts in the indictments heretofore returned against him and that he would not have entered his pleas of nolo contendere if it had not been for the mistaken belief that he would be probated or receive a suspended sentence.

Wherefore, the defendant prays that his amended motion to set aside judgment of conviction and permit defendant to withdraw his plea of nolo contendere entered herein against the defendant on May 26, 1953, and for leave to withdraw his pleas of nolo contendere, entered herein on the 8th day of April, 1953, be granted; that this Honorable Court fix a convenient time to hear the evidence of witnesses in open court in support of said motion, and that the Court grant to the defendant such other and further relief as may be fit and proper.

Odom Farrell Sullivan, Movant Defendant.

[fol. 51] By Counsel: Llewellyn A. Luce, W. D. Jochems, Tom Harley, Jr., by Tom Harley, Jr.

In United States District Court

Petition for Probation—Filed June 12, 1953

Odom Farrell Sullivan, defendant in the above entitled causes, and the petitioner herein, respectfully represents and shows to the Court:

I

1. That in the above entitled actions, this defendant was indicted on six counts. That on the 8th day of April, 1953, defendant entered a plea of nolo contendere to three of said counts and the other three counts were dismissed.

2. That on May 26, 1953, petitioner was sentenced on one of said counts to the custody of the Attorney General of the United States for a period of three years and fined in the sum of $5,000.00; on one of said counts a sentence of three years and a fine of $8,000.00 was imposed, the sentence of three years to run concurrently with the three year sentence imposed as aforesaid; that on the other of said counts sentence was suspended.

3. Petitioner moved the Court for a stay of execution for a period of sixty days to arrange his business affairs. The stay was granted for thirty days.

II

Petitioner now petitions the Court, under the provisions of the Federal Probation Act of March 4, 1925, Chapter 521, Section 1, 18 United States Code Section 724, respectfully praying that under the authority therein reposed in the Court that the Court suspend the execution of the sentence and place him on probation for such period and upon such terms and conditions as the Court may deem best.

[fol. 52]

III

Petitioner respectfully represents that the ends of justice and the best interests of the public will be served by the granting of the relief herein prayed. The ends of justice will be fully satisfied by the punishment petitioner has already suffered, is now suffering, and will continue to suffer in the future, when coupled with other penalties yet

to be imposed on the civil tax liability which, if finally determined in the amount alleged by the United States District Attorney at the time sentence was imposed, will result in his financial ruin.

IV

Petitioner, in support of his petition, respectfully submits for the Court's consideration the following:

1. Petitioner states that he entered a plea of nolo contendere to three counts of the indictment upon agreement of the United States District Attorney to dismiss the other three counts, because he believed and had reason to believe from all the facts and circumstances of the case that he was not jeopardizing his liberty, and that the Court would sentence him to pay a substantial fine, suspend any prison sentence imposed upon him, and place him under probation for such term and upon such conditions as the Court deemed proper.

Petitioner states that he did not at any time willfully and intentionally attempt in any manner to defeat or evade the payment of any tax lawfully due by him to the United States.

2. Petitioner states that he was further motivated in entering his plea of nolo contendere by the enormous complexity of the case and the burdensome costs of defense. The task of presenting to a jury the multitudinous pages of financial reports and books covering thousands of business transactions for the years involved in the indictment is incalculable. A trial of the issues would have been necessarily a prolonged trial and would have resulted in great financial expense to the petitioner for his attorneys and accountants. That among other matters, he took into consideration the fact that he desired to spare his wife and two children the humiliation of the publicity which would [fol. 53] be involved in a prolonged trial; that he believed if the case was disposed of and he was placed under probation he could then work out a settlement of the civil tax liability claimed by the Government. That the foregoing, and his firm belief that he would be probated and not obliged to serve any prison sentence were the impelling reasons for his entering the plea of nolo contendere.

3. Petitioner says that the serving of the sentence im-

posed upon him will be of great hardship and punishment to his wife and to his children who are now in the state university. The severity of the shock to petitioner's family has added greatly to the punishment petitioner has already undergone, and will continue to suffer by reason of said sentence of imprisonment.

4. Petitioner states that he is confronted with a civil liability growing out of an enormous claim asserted by agents of the Internal Revenue Department as asserted by the United States District Attorney at the time sentence was imposed; that the true amount of his civil tax liability has not been determined and that up to the present time the agents for the Internal Revenue Department have not rendered any complete statement of the claims asserted by them; but at the time sentence was imposed was stated by the District Attorney to be approximately $450,000.00.

5. That a term in prison will materially and substantially affect and delay the determination of his civil tax liability and will make it virtually impossible for his interests to be protected by fair, equitable and just determination of that question; that the business enterprises owned by defendant are not clear of debt; that defendant is indebted on said business enterprises in the amount of approximately $250,000.00, exclusive of any civil tax liability to the Government; that it is readily apparent that the Government must look to the proper operation of petitioner's various business enterprises for the payment of the tax claimed; that his business enterprises are so extensive and of such character that his personal supervision and direction thereof are essential and necessary; that he has always conducted his business activities under his close personal [fol. 54] supervision and management and has no person in his employ and does not know where to find one capable of supervising and directing the various business enterprises without the personal management of this petitioner and that if such business is deprived of his personal attention, the United States Government, his other creditors and many other persons will suffer financially; that if he is put under probation and permitted to remain in the active management of his business enterprises, they can be so directed and managed that the civil tax liability

whenever it is determined can be fully paid to the Government, and his creditors and all other persons fully protected; that his plea of nolo contendere was entered by him under the belief that it would clear the way for the determination of his civil tax liability and that by the avoidance of a protracted trial, he would be able to save a substantial amount of expense and place himself in better position to enable him to effect a settlement of his civil tax liability. That under the circumstances the petitioner sincerely believed that his plea would be of great service to the Government, to this Court, to his creditors, to his family and himself, and to his employees in the various business enterprises.

6. Petitioner says that the public welfare will be best served by suspending sentence imposed upon him and placing him on probation. Petitioner says that in all sincerity he is unable to comprehend in what respect the Government or any single individual would be benefited by his imprisonment, or in any particular that the general public would benefit or its welfare thereby be promoted. In addition to your petitioner and the members of his family, there are many persons who benefit from his efforts and his business enterprises and that the general public will be benefited by placing your petitioner in a position to properly look after his business enterprises in order to enable him to pay whatever tax may properly be due the Government and the penalties thereon and the interest which has accrued thereon, and to protect his creditors and employees.

7. Petitioner states that because of the condition of his health, the sentence imposed on him by the Court is one [fol. 55] of unusual severity; that the nature of his illness has been set forth in a statement of his physician filed with the Court; that his nervous condition has been greatly aggravated by the worry incident to the imposition of sentence upon him.

8. Petitioner states that he has always believed in the future of Wichita and states that he has always done everything in his power to be helpful to the community. That he has contributed a great deal of his time and effort and funds to matters which are of civic interest to Wichita. That among the activities in the field of civic service to the

community, petitioner has rendered service in the following capacities:

a. Former president of the Civitan Club of Wichita, Kansas.

b. District Governor of Civitan Club International.

c. Member of the Board of Directors of the Young Men's Christian Association for many years.

d. Chairman of the financial committee for about five years where he was an active leader in Y.M.C.A. drives for the raising of funds for approximately ten years.

e. Active member of the Wichita Chamber of Commerce.

f. Active member of the Wichita Independent Business Men's Association and a member of the Board of Directors for nine years.

g. Member of the Board of Directors of Wichita Federal Savings and Loan Association for the past ten years.

h. President of the Commonwealth Club, an organization for the promotion of the activities beneficial to the State of Kansas.

i. Served two full terms on the Community Chest Board of Directors and at present is a member of the Community Chest Board of Directors, serving his third term. In this capacity was a very active leader in raising of Community Chest funds for many years.

j. Active for a number of years in the promotion of the Salvation Army Penny Ice Fund Campaign.

[fol. 56] k. Leader in campaigns for polio drives and raised thousands of dollars not only through his efforts but by contributions collected in his theatres for such funds as polio, heart funds and cancer funds.

l. Was a member of the City Commission of Wichita, Kansas, for four years, 1945-1949, throughout World War II, and was Acting Mayor in the year 1941, and Mayor in his own right during the year 1942. One of his outstanding achievements on the City Commission at the time that he was Mayor, was being personally and solely responsible, even before the Pearl Harbor Attack, of settling up a Civil Defense activity in Wichita, which many cities in the United States copied as a model during World War II.

m. A member of the Executive Committee of the American Legion promoting benefits for ex-servicemen.

n. A very active leader in the support of the Wichita Guidance Center, an agency of the Community Chest, and as a result of this interest, contributed the entire receipts on the opening of his new Crest Theatre to the Wichita Guidance Center which was in the amount of $5,000.00 which amount is now set up as a trust fund in the organization known as The Sullivan Endowment Fund.

o. In the operation of his theatres for many years he has presented free shows at Christmas time to the underprivileged children of this city and for many years his Westside theatres were thrown open without charge to the children of the Masonic Home.

p. He has at all times attempted to fulfill his part, as he saw it, of being a good citizen.

9. Petitioner states that the charges set forth in the indictments returned against him in the above entitled cases constitute the only charges of a criminal nature which have ever been filed against him; that since this is the first time he has even been charged with a criminal offense, under all the circumstances hereinbefore set forth in this petition, the sentence imposed upon him is unusually severe, and petitioner respectfully asks the Court to reconsider the matter [fol. 57] in the light of all the circumstances and to place him under probation instead of sending him to prison.

10. Petitioner believes that at the time sentence was pronounced upon him, the Court did not have the benefit of all the foregoing information, and, therefore, he respectfully prays that the Court do now review and reconsider the punishment to which he should properly be subjected, and upon such review and reconsideration of his case, that the Court may suspend the sentence heretofore pronounced on him and admit him to probation upon such terms and conditions as the Court may deem best.

Odom Farrell Sullivan, Petitioner.

By Counsel: Llewellyn A. Luce, W. D. Jochems, Tom Harley, Jr.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND PERMIT DEFENDANT TO WITHDRAW PLEA OF NOLO CONTENDERE—Filed June 23, 1953

STATE OF KANSAS,
Sedgwick County, ss:

W. D. Jochems, being first duly sworn, upon oath states that he is one of counsel for defendant in the above entitled cases.

That on the morning of April 7, 1953, he was present at a meeting of counsel for defendant Odom Farrell Sullivan, namely Llewellyn A. Luce, Tom Harley, Jr., and Eugene Davis and Robert Bingham, counsel for the Government in the above cases. That the matter of a plea of nolo contendere was discussed. Mr. Davis stated that he had contacted someone connected with the Department of Justice, by telephone, and was told the Department would approve acceptance of a plea of nolo contendere, but that he was waiting for a confirmation of such approval by wire.

In the afternoon of the same day, Mr. Luce, Mr. Davis, [fol. 58] and Mr. Jochems agreed to present the matter to the Court to ascertain whether the Court would accept a plea of nolo contendere if Mr. Davis obtained the wire confirming approval by the Department of Justice. Affiant is unable at this time to state the exact language used by the Court but as he recalls it, in substance it was to the effect that it had not been the practice of the Court to accept a plea of nolo contendere in income tax cases; that the matter of defendant's civil tax liability was mentioned and the Court then said in substance that even in cases where defendant entered a plea of guilty and was put on probation, he always made it plain that the plea was entered without prejudice to defendant's rights in his civil case.

That on the evening of April 7th, Mr. Luce and Mr. Jochems met with Mr. Davis and Mr. Bingham at the Lassen Hotel; that in the course of the conversation then had, Mr. Davis was asked by affiant what position he would take in the matter if the Court should ask him as to what recom-

mendation the District Attorney desired to make, and Mr. Davis then replied that the matter would not be handled in that way; that it was not the practice of the Court to ask the District Attorney for his recommendation in such matters, but stated that he would not oppose probation or a suspended sentence. Mr. Davis also stated that he was of the opinion the Court would be lenient with the defendant in view of his good character and reputation.

That all of the foregoing conversations and statements were reported to defendant by his counsel and discussed with him and considered by him in making his decision to enter the plea of nolo contendere.

That to the best knowledge and recollection of this affiant the above sets forth in substance the conversations had prior to the entry of the plea in which affiant participated or was present.

W. D. Jochems.

Subscribed and sworn to before me this 22nd day of [fol. 59] June, 1953. Celestene Venway, Notary Public. My commission expires 2-2-57. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND PERMIT DEFENDANT TO WITHDRAW PLEA OF NOLO CONTENDERE—Filed June 23, 1953

STATE OF KANSAS,
Sedgwick County, ss:

Tom Harley, Jr., of lawful age, being first duly sworn, upon oath states:

That he is a duly authorized and practicing attorney in the city of Wichita, Sedgwick County, Kansas, and is one of several counsel representing the defendant in the above entitled actions.

That the above entitled causes were regularly set for hearing on the 14th day of April, 1953, and that the time for the impanelling of the jury was set for April 6, 1953.

That on the night of April 5, 1953, one Llewellyn A. Luce of Washington, D. C., one of the counsel employed by defendant to represent him in the above entitled actions, came to the city of Wichita, Kansas, to confer with local attorneys, W. D. Jochems and this affiant, in preparation to trying the above entitled causes.

That this affiant met Mr. Luce at the Union Station at approximately 9:30 p. m. on said day and was driven to the Lassen Hotel in the city of Wichita by this affiant. Mr. Luce registered into said hotel and he and this affiant had been in his room for only a few minutes when they received a call from Eugene W. Davis, United States District Attorney for the District of Kansas, and were invited down to his room. Mr. Luce and this affiant accecpted the invitation of Mr. Davis and visited with him in his room for approximately an hour or such a matter.

The following morning, Monday, April 6, 1953, defendant appeared in court with counsel and a jury was selected to try the above entitled actions, the jury was then excused by [fol. 60] the Court and instructed to report the following Monday or Tuesday.

The evening of said day, Mr. Luce and this affiant were again twice contacted by Mr. Davis and invited down to his room. When Mr. Luce and this affiant went to the room of Mr. Davis they were greeted by Mr. Davis and Mr. Robert H. Bingham, an Assistant United States District Attorney for the State of Kansas. After some conversation, Mr. Davis asked Mr. Luce and this affiant why they didn't plead the defendant guilty to two counts, 1 count in each indictment, and dispose of the matter. This affiant informed Mr. Davis that the defendant would not plead guilty to any of the counts because the defendant had maintained at all times and was still maintaining that he was innocent of any fraudulent conduct. Mr. Bingham then stated that he was of the opinion that the defendant should enter a plea to 3 counts of the 2 indictments and asked if defendant would enter a plea of nolo contendere to 3 counts of the indictments if the Government would dismiss the remaining three counts. Mr. Bingham went on to say that he thought the defendant was subject to Berger's Disease; that according to their information defendant's brother had died of the

disease, that his sister had to have a leg amputated as the result of said disease and that in his opinion the Court would be lenient with anyone of the character and reputation of this defendant who had a medical background such as that.

That Mr. Davis stated that he had nothing personal whatsoever against the defendant and from everything he could learn defendant was a man of good character, reputation, and very civic minded; that in the courtroom when the jury was being selected, he couldn't help but notice the lovely wife of said defendant and his two fine children, and that he would hate to see them subjected to the defendant's standing trial. He, too, stated that he was of the opinion that the Court would show leniency to a man of defendant's character and reputation.

After more conversation of the same tenor, Mr. Davis was asked directly by this affiant if he would recommend probation or suspended sentence in the event said defendant should enter a plea. Mr. Davis stated that it was not a [fol. 61] practice of this court to ask him for a recommendation but that he had no objection to probation or a suspended sentence and to be assured he would not oppose probation or a suspended sentence. Mr. Davis then said either that he would recommend that a plea of nolo contendere be accepted or that he thought he could recommend that a plea of nolo contendere be accepted. This affiant not being positive as to which remark was made. After more conversation along these lines, Mr. Luce and this affiant departed stating that they would give the proposition offered by the Government some thought and would advise Mr. Davis and Mr. Bingham.

Mr. Luce and this affiant then returned to the room of Mr. Luce where the defendant, W. D. Jochems, and the accountants for the defendant were waiting, and related to them the conversation with Mr. Davis and Mr. Bingham.

The following morning, April 7, 1953, a meeting was had with Mr. Davis and Mr. Bingham by all of defendant's counsel, at which meeting was disclosed the possibility of the Court's accepting a plea of nolo contendere on behalf of the defendant. Defendant's counsel being informed that Mr. Davis had contacted the Department of Justice by telephone and received its approval of the plea of nolo contendere but was waiting to have it confirmed by wire.

Later in the afternoon of said day, April 7, 1953, this affiant met with the defendant, Mr. Luce, Mr. Jochems, Mr. Robert I. Corey and Grant Webster, accountants employed by the defendant, in the hotel room of Mr. Luce. That this affiant was informed of the meeting of Mr. Jochems and Mr. Luce with Mr. Davis in the chambers of the Honorable Delmas C. Hill and was informed as to what had transpired at said meeting. Considerable discussion was had between all the parties present as to whether the proposition of the Government should be accepted and the defendant enter a plea of nolo contendere on 3 counts of the 2 indictments and no decision had been reached at approximately 5:00 or 5:30 p. m. of said day when this affiant left the meeting and went home for the night.

At approximately 10:30 p. m. of said day, this affiant was called on the telephone by said defendant stating that Mr. Luce and Mr. Jochems had had another conference with Mr. [fol. 62] Davis and Mr. Bingham and that they, Mr. Jochems and Mr. Luce, were of the opinion that the offer of the Government should be accepted but before making a final decision he, Sullivan, wanted this affiant present. That this affiant then returned to the room of Mr. Luce and considerable more discussion was had relative to the advisability of the defendant's accepting the proposition submitted by Mr. Davis and Mr. Bingham and entering a plea of nolo contendere to 3 counts of the indictments. This affiant was advised by Mr. Luce and Mr. Jochems that the attitude of Mr. Davis and Mr. Bingham was just as friendly and cooperative as it had been in the conferences at which this affiant had been present; that they were unable to obtain a commitment from Mr. Davis that he would make a recommendation for probation or suspended sentence but they were satisfied in their own minds that both Mr. Davis and Mr. Bingham were sincere in everything they had said and that they felt from their conversations with Mr. Davis and Mr. Bingham that Mr. Davis and Mr. Bingham actually favored said defendant receiving probation or suspended sentence.

This affiant agreed with the opinions of Mr. Luce and Mr. Jochems relative to the sincerity and the feelings of Mr. Davis and Mr. Bingham stating to all those present that he, this affiant, thought that under all the circumstances, the reputation of the defendant, his standing in the community,

his wife, and his two children in college, it would be best to accept the Government's offer and enter a plea of nolo contendere to the 3 counts of the indictments because after all a plea of nolo contendere was not a confession of guilt but was a plea that the defendant did not choose to contest the charges. It was then agreed by all parties, including the defendant, that the plea of nolo contendere to the 3 counts should be made.

On the following day, April 8, 1953, said defendant entered a plea of nolo contendere to 3 counts of the indictments, which is all a matter of record in this court.

Affiant further says that to the best of his information, knowledge, and recollection the preceding paragraphs set [fol. 63] forth, in substance, a true and correct account of the discussions and conferences leading up to the plea of nolo contendere entered by the above named defendant.

Further this affiant saith not.

Tom Harley, Jr.

Subscribed and sworn to before me this 22nd day of June, 1953. Celestene Benway, Notary Public. My commission expires February 2, 1957. (Seal.)

In United States District Court

Affidavit in Support of Defendant's Amended Motion to Set Aside Judgment of Conviction and Permit Defendant to Withdraw Plea of Nolo Contendere—Filed June 23, 1953

State of Kansas,
Sedgwick County, ss:

Comes now Llewellyn A. Luce and after being first duly sworn, deposes and says:

That he is a citizen of the United States, a resident of the District of Columbia, and has been engaged in the practice of law for a period of thirty years with offices at 937 Munsey Building, Washington, D. C.

That he is one of several counsel representing Odom Farrell Sullivan in the cases United States of America vs.

Odom Farrell Sullivan, Nos. 8751 and 8752, in the United States District Court for the District of Kansas.

That said cases were set for trial before the Court in Wichita, Kansas, on Apr. 14, 1953, and that the time for the impanelling of the jury was set by the Court for April 6, 1953.

That affiant left Washington, D. C. and came to Wichita, Kansas, to assist co-counsel W. D. Jochems and Tom Harley, Jr. of Wichita, Kansas, in the selection of the jury, the preparation of the cases for trial, and the trial thereof. That affiant arrived in Wichita, Kansas on or about 9:15 o'clock April 5, 1953, and was met at the railroad station by Tom Harley, Jr. and that they immediately proceeded to the [fol. 64] Lassen Hotel, Wichita, where they were joined by W. D. Jochems, Odom Farrell Sullivan, Grant Webster, Robert Cory, Certified Public Accountants, and Leonard Kane an employee of Odom Farrell Sullivan.

That about fifteen minutes after affiant's arrival at the said hotel, he received an invitation from the Honorable Eugene Davis, U. S. District Attorney for the District of Kansas, to join him for a social visit in the room of said Davis as the Lassen Hotel. That said affiant accepted said invitation and in company with Tom Harley, Jr., spent a pleasant hour with Dr. Davis.

On Monday morning, April 6, 1953, the jury was selected and impanelled, excused and directed by the Court to return to the Court Room on April 14th for the trial of the case.

During the evening of April 6, 1953, Mr. Eugene Davis, the United States Attorney, again invited Mr. Harley and the affiant to his room for a chat. Mr. Davis was advised by the affiant that Mr. Harley and he were very busy discussing the case with their client and witnesses and would not be able to keep an appointment for that evening. After approximately 45 minutes, Mr. Davis again called Mr. Harley and the affiant and asked them to come down to see him. The invitation was finally accepted and after a short general conversation, Mr. Davis, who was accompanied by Mr. Robert H. Bingham, Assistant United States Attorney, asked Mr. Harley and Mr. Luce why they didn't settle the cases by pleading the defendant, Odom Farrell Sullivan,

guilty to one count in each indictment and dispose of the matter. Mr. Harley advised Mr. Davis that counsel would not agree to plead the defendant "guilty" to any count because the defendant maintained and insisted that he was not guilty of any fraudulent conduct.

Mr. Bingham then stated that he was of the opinion that the defendant Sullivan should plead to three counts and asked if counsel would plead nolo contendere for the defendant on three counts of the indictments if the Government would dismiss the three remaining counts in the cases.

Mr. Davis and Mr. Bingham explained to Mr. Harley and [fol. 65] the affiant that although he understood that it was not the practice of the Court in the District of Kansas to accept pleas of nolo contendere that, nevertheless, the Court might accept such a plea in Mr. Sullivan's case.

Mr. Davis and Mr. Bingham advised Mr. Harley and the affiant that the investigation of the Treasury Department Agents disclosed that the defendant Sullivan's brother had died from Berger's disease; that the defendant's sister had suffered with said disease and had had to have a leg amputated; that defendant was in poor health and might be subject to the same disease. Mr. Davis and Mr. Bingham also stated that this appeared to be a good case for probation and that they believed the Court would be lenient with anyone of the business standing and reputation of the defendant Sullivan. Mr. Davis also stated that in the Court Room that morning when the jury was being selected he could not help but notice the lovely wife of the defendant and his two fine children and that he would dislike subjecting them to the publicity and shame of a long trial. Mr. Davis and Mr. Bingham also stated they had nothing personal against the defendant and that they understood that he was civic minded and had done much for the city of Wichita.

After further discussion, Mr. Davis was asked by affiant and Mr. Harley if he, Davis, would recommend probation for the defendant Sullivan upon a plea of nolo contendere. Mr. Davis replied that it was not the practice of the Court to ask him as United States Attorney for recommendations and that he, Davis, could not offer recommendations. Mr. Davis said however that he had no objection to probation and would not oppose probation or a suspended sentence for the defendant, Sullivan, and that he would recommend

the acceptance of a plea of nolo contendere if he could secure the approval by phone of the Department of Justice for the acceptance of a plea of nolo contendere as to three counts by the defendant and the dismissal of three counts by the Government. Affiant and Mr. Harley advised Mr. Davis and Mr. Bingham that they would report in detail to Mr. Sullivan the suggestions of the representatives of the United States and would consider the matter. Mr. Harley and affiant then returned to Mr. Sullivan who was [fol. 66] waiting in affiant's room with Mr. Jochems and reported the details of the conference with Messrs. Davis and Bingham.

On Tuesday morning, April 7, 1953, the affiant, Mr. Jochems, and Mr. Harley called on Mr. Davis, after making an appointment, at the offices of Mr. Davis in the Federal Building at Wichita. They further discussed the matter of a plea of nolo contendere with Mr. Davis and inquired if he, Davis, had been able to reach the Department of Justice. Mr. Davis informed counsel for the defendant, Sullivan, that he had called the Department of Justice but had not been able to reach the proper officials. He suggested that counsel return to discuss the matter further with him immediately after lunch on that day, April 7th.

Mr. Jochems, and the affiant returned to Mr. Davis' office after lunch as agreed and were advised by Mr. Davis that he had secured oral approval of the suggested settlement but that the Department of Justice desired a confirming wire and would in turn reply by wire giving a final decision. Mr. Davis, Mr. Jochems, and the affiant then went into the Judge's chambers for discussion of the matter with the Honorable Delmas C. Hill, Judge of the United States District Court for the District of Kansas. The purpose of this visit was to ascertain whether His Honor would consider the acceptance of a plea of nolo contendere. Mr. Davis explained to Judge Hill that he would recommend a plea of nolo contendere on three counts of the indictment and dismissal of three counts of the indictment by the United States Government and also that the Department of Justice approved of this procedure.

Judge Hill thereupon asked counsel for the defendant if there were any civil liabilities for taxes outstanding against defendant Sullivan and they replied there were outstanding

civil liabilities which would either have to be settled or adjudicated before the Tax Court of the United States. Judge Hill then stated, in substance, that even in cases where a defendant entered a plea of guilty and was put on probation he always made it plain that the plea was entered without prejudice to defendant's rights to dispose of his civil liabilities.

[fol. 67] The parties then retired from Judge Hill's chambers and counsel for the defendant, Mr. Jochems and Mr. Luce, informed Mr. Davis that they would further advise him about the decision in the matter in order that he might send his wire to the Department of Justice.

That evening, April 7th, Mr. Jochems and the affiant called upon Mr. Davis in his room at the Lassen Hotel, Mr. Bingham also being present. The matter of a plea was further discussed and Mr. Davis was asked by Mr. Jochems what position he would take in the matter if the Court should ask him what recommendation the District Attorney desire to make. Mr. Davis replied that the matter would not be handled in that way; that it was not the practice of the Court to ask the District Attorney for his recommendation but further stated in the course of the conversation that he would not oppose probation or a suspended sentence. Mr. Davis also stated that he thought the Court would be lenient in view of his good character and reputation.

Mr. Jochems and affiant then advised Mr. Davis to send his wire to the Department of Justice and that counsel would further go over the matter with their client. Mr. Jochems and the affiant then further discussed the matter with Mr. Sullivan and Mr. Harley.

On April 8th, 1953, Mr. Harley, Mr. Jochems, and the affiant again called on Mr. Davis and stated that the plea of nolo contendere would be entered. Mr. Davis stated, however, that he had not received his wire from the Department of Justice and counsel for the defendant were advised to return immediately after lunch.

Early in the afternoon of April 8th, Mr. Harley, Mr. Jochems, and the affiant returned with Mr. Sullivan to Mr. Davis and he, Davis, advised them that he had again reached the officials of the Department of Justice by telephone and that they had given him authority to go ahead with the mat-

ter and that they would send the wire in due course. Thereupon counsel for the United States and counsel for the defendant, accompanied by the defendant, went before the Court and formally entered a plea of nolo contendere upon *there* counts of the indictment, as shown by the records of proceedings made on that date.

[fol. 68] All conferences and discussions between counsel for the defendant and counsel for the United States, and the Court, were duly reported to the defendant Sullivan, in detail, for his consideration. The defendant Sullivan was unwilling to enter a plea of guilty, he was also very reluctant to enter a plea of nolo contendere and gave his consent thereto only after all conversations had been reported to him and discussed with him and the attitude of the United States' attorney in the premises had been fully reported to him.

Affiant further says that to the best of his knowledge, information, belief, and recollection the above paragraphs set forth in substance the discussions and conferences leading up to the plea of nolo contendere entered by the defendant.

Llewellyn A. Luce.

Subscribed and sworn to before me this 22nd day of June, 1953. Celestene Benway, Notary Public. My commission expires February 2, 1957. (Seal.)

In United States District Court

Affidavit—Filed June 23, 1953

Eugene W. Davis, being first duly sworn, on his oath states that he has read the defendant's Motion and Amended Motion to set aside judgment of conviction filed in the above-numbered criminal cases; with reference to the conferences mentioned in defendant's amended motion, affiant desires to make the following statement.

On the evening of April 5, 1953, affiant and Robert H. Bingham, Assistant United States Attorney, arrived in the City of Wichita about 9:30 p.m. Affiant registered at the Lassen Hotel; while standing in the lobby shortly after ar-

riving I thought I recognized Mr. Lewellyn A. Luce, one of defendant's attorneys from Washington, D. C., getting on the elevator. On going to my room I called to inquire if Mr. Luce was registered at the hotel, just to pass the time of day—it was merely a friendly gesture to greet an out of town fellow lawyer. Mr. Luce came to my room on his own volition and I believe Mr. Tom Harley, one of defendant's [fol. 69] attorneys, came with him at the time or shortly afterwards. I recall no statement with reference to the Sullivan cases being made by either of us at that time.

On Monday morning, April 6, 1953, a jury was selected to try both criminal cases against the defendant. The actual trial was scheduled to commence about a week after the jury was impaneled, trial date being set for April 14, 1953. On the evening of April 6th I invited Mr. Luce to my room for a conference. At that meeting Mr. Luce and Mr. Harley, counsel for defendant, Mr. Bingham, my assistant in the case, and affiant were present. The visit initially was generally lawyers' conversation until Mr. Luce stated that he wished he did not have to try the case. I think I stated, "Why don't you plead the defendant guilty and it would save us all a lot of trouble." Mr. Harley then spoke up and said he didn't think the defendant would plead guilty because "Sully" as Mr. Harley referred to the defendant still maintained he was not guilty of fraudulent conduct with reference to the various tax returns involved. Mr. Bingham, my associate, then stated that it was our impression that the defendant was guilty and that everybody present knew it to be a fact. Mr. Bingham farther mentioned that *may be* some sort of compromise could be reached—for instance a plea of guilty by the defendant to half the counts with the Government dismissing the remaining three. At this point Mr. Luce mentioned the subject of civil liability and stated that a plea of guilty would require the defendant's payment of 50 percent fraud penalties in the civil tax case. Mr. Luce suggested the possibility that the defendant tender a plea of nolo contendere to one count in each indictment. Mr. Bingham and I took the position that he could hardly expect such an arrangement, but that the defendant ought to tender a plea to at least half the counts involved. Mr. Luce then inquired as to the practice of the United States Attorney's office in this District with

reference to recommendation regarding sentence or probation, as the case might be and dwelt at length in this connection on the variance as to such recommendations by the various attorney's offices he had come in contact with.

I stated that the policy in this district was that the district attorney made no recommendations in a criminal case [fol. 70] except at the request of the court and that the court ordinarily in cases of this type did not request recommendations. I went on to state that to the best of my recollection Judge Hill had never accepted a tendered plea of nolo contendere in a criminal tax case, but that did not necessarily mean he might not do so in this instance. Mr. Luce then stated that he had no information as to what type sentence would be imposed by the courts in this district, whether custodial or probation, when a defendant entered a plea of nolo contendere.

There was some discussion that in some cases sentences had been imposed along with substantial fines, and that in one recent case upon a plea of guilty the defendant had been placed upon probation. I recall Mr. Bingham saying, however, that probation was granted because of the very poor physical condition of that defendant as determined through examination by court appointed doctors. Mr. Bingham went on to say that Sullivan's counsel might follow the policy of other defense counsel in this district by informing the court in their plea for probation of the defendant's physical condition. Mention was made that our file revealed that defendant's brother had died of Berger's disease and that defendant's sister had had a leg amputated for reasons unknown. Mr. Bingham then stated that the file reflected, however, that the defendant was a man of boundless energy who daily worked from 9 or 10 in the morning until midnight or 1:00 a.m.

I believe I remarked I had no knowledge concerning Berger's disease with reference to whether it was inheritable or not, but that Mr. Sullivan's physical condition in any case would have to be verified by competent medical practitioners. I recall no statement of Mr. Bingham or myself that the court would be lenient with this defendant because of his character, reputation or medical background, if any.

Mr. Luce stated that he was aware that most courts would

hear defense counsel regarding the physical condition of the defendants and was glad to hear that our courts would do the same. I then stated that it seemed to us that a trial was a useless expense, that it would consume a lot of time [fol. 71] and result in quite unfavorable publicity for the defendant, which up to that time he had completely avoided in the press. Further, I stated that the jury which had been selected that morning seemed to me a good jury of mature individuals who would follow the evidence and so far as we were concerned would in all probability bring in a finding of guilty as charged in both indictments.

Mr. Luce then stated that he and Mr. Harley were to have further conferences that evening with the defendant and the accountants involved and that they would think over the possibility of tendering pleas of nolo contendere and discuss the matter further with us the following morning.

On Tuesday, April 7, we completed and filed the Government's praecipe for subpoena, four in number for a total of 28 witnesses. On the same day affiant called the Tax Division in Washington on the telephone to ascertain for certain if we should oppose a plea of nolo contendere, which from the general tenor of defendant's attorney's conversation we felt imminent. On that evening of April 7, 1953, Mr. Luce and Mr. Jochems came to my room where Mr. Bingham and I were and we continued the conference with reference to tendering a plea of nolo contendere. I informed defendant's counsel that the Department of Justice advised that the plea should be tendered on those counts which alleged the greatest fraud and defendant's counsel indicated that such would be acceptable to the defendant. In the same discussion, Mr. Jochems and Mr. Luce made considerable additional inquiry as to the position of United States Attorney's office with reference to probation. Defendant's attorneys seemed to take the position that we were not worried about any amount of fine just so Mr. Sullivan did not go to prison. Affiant feels constrained to say that defendant's attorney's did their best to extract a promise to recommend probation and affiant states further that as carefully and as painstakingly as he knew how, he avoided any such commitment.

Affiant further states that in the first place no one knows better than the writer that the matter of sentence is one

exclusively for the Court; as to whether the Court would place Mr. Sullivan on probation was a risk which defendant [fol. 72] would have to take; affiant recalls that he told the attorneys that they better work on the probation office rather than the Government's attorneys. I recall making no statement or giving assurance that I would not oppose probation or a suspended sentence; on the other hand, I endeavored to make it clear to defendant's counsel that they were on their own in that regard and affiant did not propose to take a position one way or the other and hoped that the Court did not ask me. Definitely I advised defendant's counsel that I would not recommend probation. The record of the proceedings at the time of sentence establishes that affiant adhered literally to that position by making no recommendation to either sentence or probation.

During the course of the conversation, Mr. Luce directed the same inquiry to Mr. Bingham as to what he would say if the Court should ask for a recommendation as to probation. Mr. Bingham stated that in his opinion the defendant was the largest tax violator ever brought to trial in this district and that Mr. Bingham felt thoroughly convinced that the defendant was guilty as charged in all counts. Mr. Bingham then stated that if the court asked him for a recommendation he would recommend a year's sentence per count to run consecutive, $10,000 per count, costs of the prosecution, and further attempt to make the defendant pay for the second trip from Korea of Captain Stamm. Mr. Luce, at that point, threw up his hands, stating he certainly hoped the court would not ask Mr. Bingham for a recommendation. Mr. Bingham stated he was quite sure the court would not do so and further he would rather go to trial in the matter since he needed the experience and he would obtain a considerable amount of same against such an imposing array of counsel.

Affiant, of course, has no knowledge of what transpired between defendant and his own attorneys. Affiant had no contact with the defendant except in the Court Room on the morning of April 6th, shortly prior to the selection of the jury to try the above numbered cases, at which time defendant introduced his wife and children to this affiant. Affiant further states that he has no personal feeling or ill will against the defendant, and in presenting the matter to

[fol. 73] the Court at Kansas City on May 26, 1953, when sentence was imposed, affiant merely related facts to the Court as disclosed by the Revenue Agents' reports.

Further affiant saith not.

Eugene W. Davis, United States Attorney.

Subscribed and sworn to before me this 23rd day of June, 1953. Fred J. Partridge, Deputy Clerk, United States District Court for the District of Kansas. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed June 23, 1953

Robert H. Bingham, being first duly sworn, on oath deposes and says:

1. That he as an Assistant United States Attorney for the District of Kansas, and with the United States Attorney, handled the prosecution for the Government in Criminal Cases No. 8751 and 8752.

2. That he attended the conference alluded to in paragraphs number two, three, four and five of defendant's Amended Motion to Set Aside Judgment of Conviction and Permit Defendant to Withdraw His Plea of Nolo Contendere.

3. This affiant states that at no time in any of the conferences between counsel of opposing parties did Mr. Davis state that he had, "No objection to probation or a suspended sentence," nor did Mr. Davis state that he "would not oppose probation or a suspended sentence." To the contrary, Mr. Davis stated that, "He would not recommend probation."

4. This affiant further states that defendant's counsel asked Mr. Davis on several occasions what his recommendation would be if the Court requested Mr. Davis' recommendation as to the sentence to be imposed on the defendant. On each occasion Mr. Davis stated that he hoped the Court would not request his recommendation because it was not [fol. 74] his duty to make recommendation in cases such as this. Finally, Mr. Luce directed the same question, that is,

"What would your recommendation be?" to this affiant. Whereupon, the affiant answered that he was convinced that the defendant was guilty as charged in all six counts of the two indictments, that it was this affiant's belief that the evasions committed by the defendant were the most gross evasions that had ever occurred in the District of Kansas and, therefore, this affiant's recommendation would be a year's sentence per count on each of the three counts to run consecutively, the imposition of a $10,000 fine per count with the defendant to pay the costs of the prosecution in both cases. At that answer Mr. Luce threw up his arms and stated he hoped the Court didn't request any recommendation from the affiant.

5. With reference to the allegations in paragraph two of defendant's amended motion, the affiant states that Mr. Luce stated that he had had no experience before this Court and wondered what the policy was with reference to the hearing when the defendant made his plea for probation, i.e., whether the defendant was permitted to produce character witnesses, present letters from his friends, etc. This affiant answered that the Court was very liberal and had on occasions permitted character witnesses to testify in behalf of the defendant, that the Court would receive letters presented in behalf of the defendant relating to the defendant's reputation and good character. The affiant further stated that in many cases medical reports of the defendant's physical condition were accepted by the Court. In this connection the affiant stated that the reports of the agents of the Internal Revenue showed that the defendant's brother had died of Berger's disease and that a sister of the defendant had had a leg amputated. The affiant stated that he had no knowledge as to why the sister had to have the leg amputated but thought it could possibly have been the same disease which had afflicted the defendant's brother. Affiant then stated that it was his opinion, however, that the defendant was in perfect physical condition since the reports from all three Revenue Agents who had contacted the defendant indicated quite clearly that the defendant was a hard working business man of "boundless energy," that the [fol. 73] defendant often worked from 9:00 or 10:00 o'clock in the morning until midnight or 1:00 a.m. at night and that this schedule was continued for 6 and sometimes 7 days a

week. Affiant stated however that it would certainly be in order for counsel to have a medical examination of the defendant made and the results thereof presented to the Court who, if the facts so indicate, might wish to have Court appointed doctors perform a further examination.

6. The affiant states that never once did he indicate to counsel for the defendant that the defendant would be placed on probation or be given a suspended sentence if he tendered pleas of nolo contendere to the indictments in Criminal Cases No. 8751 and No. 8752. To the contrary, affiant states that in all conversation held with counsel for the defendant he continually maintained that the defendant was guilty as charged, that his guilt could be proved by the Government beyond a reasonable doubt and further that he was convinced that the jury which had been duly impaneled and sworn would most assuredly return such a verdict.

Further affiant saith not.

Robert H. Bingham, Assistant United States Attorney.

Subscribed and sworn to before me this 23rd day of June, 1953. Fred J. Partridge, Deputy Clerk, United States District Court for the District of Kansas. (Seal.)

In United States District Court

Exhibit B—Filed September 25, 1953

Narrative Statement of Transcript of Proceedings Had on June 23, 1953 and on June 25, 1953

Appearances:

Eugene W. Davis and Robert H. Bingham for the plaintiff-appellee. Llewellyn A. Luce, Tom Harley, Jr., and W. D. Jochems for the defendant-appellant. Defendant was present in person.

Thereupon counsel for defendant presented the defend- [fol. 76] ant's motion in arrest of judgment based upon the ground that the Court is without jurisdiction of the offense, argued said motion and it was overruled by the Court. Mr.

Harley, in behalf of defendant, presented the amended motion to set aside the judgments and to permit the defendant to withdraw his plea of nolo contendere. Thereupon counsel for defendant read to the Court the affidavits of W. D. Jochems, Tom Harley, Jr. and Llewellyn A. Luce; said affidavits were offered and admitted in evidence. (Request for the printing of these affidavits has been made in paragraph 17 of the designation of parts of record to be printed).

Thereupon Mr. Harley argued the matters involved at length with reference to the facts set forth in the affidavits and was followed by Mr. Luce who argued with reference to the questions of law involved. In the course of his argument Mr. Luce was permitted to file as a part of the record a copy of appellee's motion to vacate judgment and sentence and for leave to withdraw his plea of guilty which was filed in the case of United States vs. Lias, 173 F. 2d 685.

The petition for probation was then presented by Mr. Jochems. In support of the petition for probation testimony was offered.

Earl Schaeffer, Vice-President of Boeing Airplane Company and general manager of the Wichita Division, testified in behalf of the defendant. Witness testified that he had known the defendant for from twelve to fifteen years, knew him in a business way and in connection with various civic activities and in activities connected with the American Legion and the defendant's general reputation as to his character and integrity was excellent in the community. Witness recommended that he be placed under probation.

Frank T. Priest, who had been in the insurance business in Wichita forty-one years, stated that he had known the defendant Sullivan for approximately twenty-five years and had known him in connection with the work of veterans' organizations, in baseball activities connected with the youngsters and in connection with many drives, Community [fol. 77] Chest, Red Cross and other drives of that nature; knew the defendant while he was city commissioner and Mayor of Wichita; gave it as his opinion that the defendant was a first class citizen in every respect and his general reputation for integrity and truthfulness was first class and he recommended probation to the Court.

The following citizens of Wichita, with some variation in

the time they had known defendant, testified in substantially the same manner as the two above named and all recommended probation to the Court:

Grover Pierpont, lawyer, formerly judge of the District Court of Sedgwick County, Kansas for twenty years.

Frank Barr, Vice-President of the Kansas Gas & Electric Company, a Colonel of Infantry in the Army.

Harold W. Goodwin, lawyer, been practicing law since 1921; in Wichita since 1945.

Mrs. H. W. Ralstin, widow of Dr. Ralstin, a dentist who formerly practiced in Wichita and had known the defendant for many years, belonged to the same church; defendant was in her Sunday School class.

Mrs. Bruce Meeker, wife of a physician in Wichita; had lived in Wichita twenty-five years and known the defendant for fifteen years; knew of his work particularly in connection with the Wichita Child Guidance Center.

H. D. Lester, lived in Wichita since 1906, was connected with the Fourth National Bank since 1923; now a director of that bank and one of the commissioners of the City of Wichita; had known the defendant in connection with the Y.M.C.A., Red Cross, Community Chest and in a business way with the bank.

Charles Gillium, been engaged in the manufacturing business about twelve years in Wichita; resided here nineteen years; had known the defendant many years socially; visited in his home and Mr. and Mrs. Sullivan visited in Gillium's home. This relationship had continued about sixteen years. [fol. 78] Earl K. Duke, former commissioner of the City of Wichita, owner of Duke, Inc., a printing and supply business, been engaged in that business since 1916, known defendant for many years.

Gerald Byrd, a funeral director, resided in Wichita since 1931, had known the defendant six or seven years and knew of the various activities of the defendant.

E. C. Moriarity, lived in Wichita 52 years, been on the City Planning Commission; was on the City Commission about five and one-half years during the time defendant was on the City Commission (Tr. 44-79).

Winfield Brasch, testified that he is an investment broker, specializing in theater properties, that he has been negotiating a deal between the defendant and other parties rela-

tive to the purchase of defendant's theater properties; the deal would require considerable time to consummate because of the details involved and under the circumstances it would have to be worked out subject to the approval of the Internal Revenue Department; that he thought the deal might be completed in seventy-five to ninety days.

Thereupon the various matters before the Court were argued by Robert H. Bingha· , Assistant United States Attorney. He offered in evidence his affidavit. (The printing of this affidavit has been requested in paragraph 17 of the designation of parts of the record to be printed.)

Eugene W. Davis, United States District Attorney, then argued the matters involved. In the course of his argument he state-: "I have read with quite a bit of interest the statements of Mr. Luce, Mr. Harley and Judge Jochems. There is not an awful lot of difference in the recitation of events, as I mentioned a little bit ago, Your Honor, in what they say as to the happenings and what we say." He then stated that he had prepared an affidavit setting forth his recollection of the occurrences which he then offered in evidence.

* * * * * * *

[fol. 79] Burt N. Morgan, called as a witness for and on behalf of the government, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Burt Morgan, state your name to the court and your official position.

A. Burt N. Morgan. I am special agent with the Intelligence Unit, Bureau of Internal Revenue.

Q. How long have you been engaged in that capacity?

A. Approximately eleven years.

Q. Did you have occasion to work on the income tax case of the defendant in this case?

A. I did.

Q. Along with any other agents?

A. Two other agents.

Q. Who were they?

A. Richard W. Walker and William Stamm.

Q. Mr. Walker is deceased at the present time, is he not?

A. That is correct.

Q. And Mr. Stamm is in Korea, is that correct?

A. Yes, sir.

Q. You are the only one of the three agents that are here in Wichita at the present time?

A. That is correct.

Q. But you and the other two agents, whose names were mentioned, did work on the case at odd times, some of the time together and sometimes independently, is that correct?

A. That is correct, we conducted what is known to us as a joint investigation.

Q. Now in a general way, without going into tedious details, in a general way, what did you do in connection with the investigation?

A. As a special agent it was my duty to gather facts and evidence which would be presentable into court to substantiate any claims against the government in the form of income tax deficiencies or other taxes owed to the government.

Q. As a revenue agent, did you compute liabilities of Mr. Sullivan?

A. I personally did not compute them but one of the other revenue agents did and I concurred or checked with them on it.

Q. Do you have the computations in your files as a revenue agent?

A. That is correct.

Q. And can you refer to them?

A. I can.

Q. Now are you able to state as a result of your investigation and the reports that you have, based on the facts of [fol. 80] the investigation, and on the computation, the unreported net income and the basic individual income tax deficiency for Mr. Sullivan for the years under investigation?

A. Yes, sir.

Q. What years were they, by the way?

A. For the years 1941 through 1948.

Q. In the conduct of your investigation and computations which you say you have made, have you computed the fifty percent fraud penalty?

A. Yes, sir.

Q. Based on the facts disclosed by the investigation, have you computed the corporation income tax deficiency for the years under investigation, the corporation of which Mr. Sullivan was president?

A. Yes, we computed it for I believe three corporations.

Q. All right. Have you computed the fifty percent fraud penalty so far as the corporate returns are concerned?

A. Just in the case of one.

Q. Which one?

A. Central Theater Company.

Q. Central Theater?

A. Yes.

Q. Is that the return for the Central Theater known as the second indictment in which Mr. Sullivan, as president of the corporation, allegedly made false income tax returns?

A. That is correct.

Q. Now as a result of the investigation did you have an occasion to compute other tax deficiencies other than individual income tax and corporate income tax?

A. Yes, sir.

Q. And what were they?

A. Gift taxes.

Q. Were there any penalties involved in those?

A. Yes, sir.

Q. Now I want you to state, Mr. Morgan, in a general way, from your investigation and knowledge of the case and the computations that you have made, give the deficiency and penalty by class of tax and the amount involved, the *the* amounts involved.

A. The individual income tax deficiencies as computed, based upon the facts as disclosed by our investigation, the individual income taxes due or deficiency, $186,899.62, penalties $91,732.82, for a total tax deficiency and penalties of $278,972.44. For corporate taxes, deficiencies, $58,679.29, penalties $35,256.22, total $93,935.51. Gift taxes, deficiencies, $17,122.51 Penalties $12,792.69, total $30,215.20, total tax deficiencies due $268,001.42. Total penalties $140,121.73, [fol. 31] total tax deficiencies and penalties $403,123.15.

Q. I want to ask you if that includes interest.

A. That does not include interest.

Q. Actually, if interest is due and owning and collectible, would that increase the sum of $403 thousand and some odd dollars?

A. It would increase it considerably, sir.

Q. How much?

A. Well, over a half million dollars, would make the total well over that.

Q. You mean the total would be well over a half million dollars?

A. Yes.

Q. That Mr. Sullivan owes, according to the government's claims?

A. That is correct.

Mr. Davis: I believe I have nothing further, Your Honor.

The Court: Did your audit reflect the amount of unreported income both individually and corporate, year by year?

A. Yes, sir.

The Court: I would like to have that in the record, please.

By Mr. Davis:

Q. ——

A. For the year 1941, per return, there was reported $5,434.64. The corrected net income as disclosed by our examination was $27,640.05. For unreported net income, $22,205.41. 1942, per return, $8,620.38; corrected, $25,499.86. Unreported, $16,879.48. 1943, per return, $5,653.02; corrected, $64,615.84; unreported, $58,962.82. 1944, per return, $13,429.16; corrected, $54,310.48; unreported, $40,881.32. 1945, per return, $15,064.27; corrected, $42,470.44; unreported, $27,406.17. 1946, per return, $18,284.69; corrected, $47,495.62; unreported, $29,210.93. 1947, per return, $9,695.80; corrected, $49,108.46; unreported, $39,412.66. For 1948, reported per return, $60,868.53; corrected, $138,021.09; unreported, $77,152.56. May I ask Your Honor a question?

The Court: Yes.

The Witness: I have in my total figures here returns filed by Mrs. Sullivan filed for two years. Should I read those?

The Court: No, I am not concerned with Mrs. Sullivan.

A. All right. The income tax deficiency for 1941, per [fol. 82] return, $335,000.50; the corrected tax due, $7,780.24; deficiency, $7,444.74. 1942, per return, $1,038.11.

Q. Isn't that $1538?

A. $1,538.11. Corrected, $9,141.47; deficiency, $7,603.36. 1943, tax per return, $906.40; corrected $37,892.47; deficiency, $36,986.07. 1944, per return, $3,756.78; corrected $30,542.04; deficiency, $26,785.26. 1945, per return, $4,505.36; corrected, $21,467.38; deficiency, $16,962.02. 1946, $5,000—per return—$5,309.09; corrected, $22,739.93; deficiency, $17,430.84. 1947, per return, $1921.60; corrected, $23,843.12; deficiency, $21,921.52. 1948, per return, $21,661.81; corrected, $70,673.62; deficiency, $49,011.81.

Q. Mr. Morgan, you have referred to what appears to be the second or column 2 in your summary report that you are apparently reading from, column 1 being "Per Return", and the next column you used the term, "Corrected", and the next column, "Unreported". What do you mean by the word, "Corrected", does that mean that the defendant filed a corrected return or do those figures under "Corrected", mean what should have been reported?

A. That means what should have been reported.

Mr. Davis: I have no further questions.

The Court: What is the total of the unreported income for the years 1941 through 1948?

A. If you will bear with me just a moment, I will take these other figures out. The total unreported income is $312,111.35.

Mr. Davis: And the tax?

A. Just a moment.

The Court: I think he gave the tax.

A. The total tax, individual income tax, $184,145.62.

Q. That doesn't include the corporations?

A. No.

Q. Or the gift tax?

A. Nor the gift tax nor the penalty. That is just the back tax deficiency, individual deficiencies.

Mr. Davis: I have nothing further from Mr. Morgan, Your Honor.

Mr. Luce: For the record, if Your Honor please, I would like to ask a few questions.

The Court: Certainly.

[fol. 83] Cross-examination.

By Mr. Luce:

Q. From what paper have you been reading, Mr. Morgan?

A. From my special agent's report.

Q. Now have you also a revenue agent's report?

A. Do I have?

Q. Yes, in your possession?

A. Not here, but I have access to it, yes.

Q. Now was your special agent's report sent to the tax payer recently?

A. As I understand it, Mr. Luce, the thirty-day letters were sent to the tax payer and under present procedure those are very similar to what are known as revenue agent's reports, that is correct.

Q. Now about when, if you know, was this thirty-day letter sent to the tax payer; within the last two weeks sometime or do you have the dates there?

A. I don't have the dates there but it is my opinion from talking to the revenue agent that it was sent approximately two weeks ago.

Q. Now, when did you begin this investigation?

A. It was assigned to me in May 1949.

Q. Did you ever, from 1949 until two weeks ago, advise the taxpayer with respect to any of these amounts of these claimed liabilities?

A. No, sir, I did not.

Q. Do you know whether Mr. Walker did or not?

A. Not of my personal knowledge, no, I don't.

Q. Do you know whether Mr. Stamm did or not?

A. No, sir.

Q. Now isn't it a fact that the tax payer was never advised of these liabilities until about two weeks ago?

A. It is the policy of the Bureau not to inform them of them. If he was, it was against regulations, sir.

Q. Well, it is a fact then that he was not advised?

A. I didn't advise him of it, no, sir.

Q. Well, now, you do know, however, that the chief counsel's office in Washington did give a computation of the tax and additional income and penalties, you remember that, don't you?

A. I have read a transcript of what purported to be a conference in Washington, yes, sir, what took place I don't know other than having read.

Q. Well, you are satisfied it was a conference in Washington, wasn't it?

A. Yes.

Q. It was sent to you officially from Washington?

A. That is correct.

[fol. 84] Q. And it was a conference, wasn't it?

A. I say I read the transcript of what purported to be an——

Q. Now are those figures that you have just given us revised since this report from Washington, which I believe you received about at the end of 1950 or the first part of 1951, are those revised figures or are they the same figures that were computed at that time?

A. These are the same figures that were in my original report. They have not been revised.

Q. The same figures then that originally went to Washington, is that a fact?

A. Yes, sir.

Q. No changes made as a result of that conference?

A. No, sir.

Q. Now you have given us figures from 1941 to 1945. Now isn't it a fact that those figures are computed on the net worth basis?

A. No, sir, they are not. I wish you would define net worth, please, first. Will you give me your definition of net worth and I might change my answer.

Q. How are they computed then, tell us how they are computed from 1941 to 1945?

A. I would say that they are based upon a hybrid system, a combination.

The Court: I didn't hear you, what system?

A. On a hybrid system. I would refer to it as a combining, combining of both net worth and specific items and expenditures.

Q. And bank deposits?

A. Bank deposits.

Q. Well, how can you have a tax liability computed both on net worth and specific items; will you tell me that?

A. Mr. Luce, will you define a net worth now?

Q. I will explain it to you.

A. Accountingwise——

Q. I think in determining a tax payer's liability on the net worth basis, say for 1941, you determine what all his assets are January 1, 1941, and his liabilities, subtracting the liabilities from his assets gives his net worth at that date. Then as of December 31, 1941, you take his assets, subtract his liabilities, which gives his net worth. Now to compute the tax liability don't you take the increase of net worth and add in living expenses, and non-deductible items and federal income taxes paid to produce income for the given years; isn't that the net worth basis in a nut shell?

[fol. 85] A. In a nut shell, yes, however, he might have expended some item which does not appear on a net worth which would be an expenditure which you might include as income.

Q. That would be what I said was a non-deductible item that you add at the bottom, is that right?

A. Yes, it would be a non-deductible item.

Q. And then you also deduct in the final computation the deductible expenditures, isn't that right?

A. That is correct.

Q. Well now, after following that through, you still say that you made this computation on a hybrid method, or did you use net worth for those first years, or did you make the computation yourself?

A. I didn't make the computation myself, although I did help with it and concurred in the computation after it was made.

Q. Well now, as a matter of fact, your work pertained mostly in 1948, did it not?

A. No, sir.

Q. Did you work on the prior years?

A. I worked on all the years under investigation, sir.

Q. All right, go ahead now and explain now about your hybrid system.

A. I can't be definite about the particular years here, but there are some years on which we based the income on the bank deposits plus expenditures, and giving him credit for non-deductible items and statutory deductions such as depreciation and so forth.

Q. Some years your bank deposits then and some years net worth, is that right?

A. That is correct.

Q. Now we get up to the year 1945. From 1945 on, how was it still computed, on the net worth basis, or on a hybrid method?

A. The year 1945, the figures that I gave awhile ago are computed on the basis of an increase in net worth and other expenditures.

Q. Now, how about 1946 through 1948?

A. The year 1946 is based on specific items of omitted income.

Q. 1947 also?

A. We also have an alternative computation by net worth of 1946, which I didn't read; for 1947 it is based upon omitted income.

Q. In 19——

A. Of specific items.

Q. In 1948, how is it based?

A. In 1948 it is based upon specific items, omitted income.

Q. Now the figures that you have given represent what you and your co-agents claim the tax payer owes, is that [fol. 86] right?

A. It is based upon the facts as we found them from our investigation.

Q. That is your determination, your claim. They haven't been determined by any adjudicating body, have they?

A. They have been approved by our superior.

Q. Well, have they been determined by any adjudicating body?

A. No.

Q. In other words, that is the claim of this Wichita office?

A. No, sir, that is not.

Q. What is it the claim of then?

A. It is the claim of, these computations, are based upon facts as developed by our investigations by agents of the Bureau of Internal Revenue and their superior.

Q. Who sent the thirty-day letter to the tax payer?

A. The audit section of the director's office.

Q. That is the Wichita office, is it not?

A. Well, he is located in Wichita, yes.

Q. Practically speaking, yes.

A. The revenue, bureau of internal revenue, to me, is bigger than the Wichita office.

Q. It didn't come from Washington or New York; it came from Wichita?

A. Under the reorganization, the office in Wichita is as big as the one in Washington.

Q. Well, I expect so. Now, I wish you would tell us now what remedies, if you know, now does the tax payer, just for the record in this case, does the tax payer have to correct this determination to combat it, what remedies, or do you know?

A. Yes, I think in a general way I do.

Q. Let me ask you some questions to make it faster and to refresh your memory. Now the tax payer can file a protest to this determination, can he not?

A. That is correct.

Q. Now that protest is considered then by the director's office, is it not?

A. They have an informal conference.

Q. Yes, informal conference. Now if the tax payer is not satisfied with the informal conference, what is the next step?

A. File a petition with the tax court.

Q. Now isn't there an intermediate step; they can appeal to what is called the appellate staff, isn't that right?

A. I think that is correct, although the appellate staff technically is part—all right, that is correct.

Q. Now, you say an informal conference. Who would this informal conference be held with; with you and your co-workers?

A. I think under the conditions of this kind, Mr. Luce, [fol. 87] that I would be present at the informal conference, yes, sir, and a group of what is known as a group chief, and then under normal conditions, the agents who worked the cases would be. However, in this case, both Mr. Walker is now deceased and Mr. Stamm is no longer with the bureau.

Q. Then when the case goes to the appellate staff, the conference is held with other parties, is it not?

A. Yes, sir.

Q. With reviewing officials in the appellate staff?

A. Yes.

Q. Now if the tax payer isn't satisfied, with what happens to him in the appellate staff, he can still go to the tax court of the United States, can he not?

A. That is correct, or he can pay the tax and file a petition for refund in the District Court.

Q. And have the matter adjudicated either by the tax court or the district court, is that right?

A. So I understand it.

Q. And none of these steps have been taken in this case except the issuance of the thirty-day letter, is that correct?

A. To my knowledge, that is correct.

Q. Now in this computation that you have had, now that computation contains what is known as technically an adjustment, does it not, depreciation, use for life of property, charge-off for repairs; it contains all of the technical adjustments, does it not?

A. That is correct.

Q. And it also contains adjustments that involve questions of law such as capital gain?

A. That is correct.

Q. Now isn't it a fact that for the year 1948 that that report does not recognize the sale of these Enid properties as capital gain?

A. That is correct.

Q. That is a legal issue, isn't it?

A. It might be a matter for argument, yes.

Q. So that there are many issues involved on the net worth technical adjustments and question of law in this determination, is that a fact?

A. I wouldn't say many, no. There are possibly some where there might be a difference of opinion, yes.

Q. Difference of opinion, yes. Now I want to ask you a question about these gift taxes. I think you said that there was a liability somewhere computed of an item of $17,500 [fol. 88] in gift taxes. Have you got that computation there; is that a part of that report?

A. Yes, sir.

Q. Has the tax payer been notified, received any thirty-day letter about gift taxes?

A. No, sir. I mean that is my understanding that he hasn't.

Q. Well, what year are those gift taxes for, or do you know?

A. Yes, sir. For the years 1942, 1943, 1944, 1945, 1946, 1947 and 1948.

Q. Do you know why the tax payer hasn't been notified with respect to this gift tax liability?

A. Yes, sir.

Q. Why?

A. Because we have not—it is not the policy of the bureau to notify a tax payer of all of his liabilities until after the criminal aspects of the case have been disposed of.

Q. Now with respect to these gift taxes, is that an alternative tax, if some other issue is decided against you, or is that straight determination of gift tax?

A. It is determination of the gift tax alleged to be owed by the facts disclosed by our investigation.

Q. Now, as a matter of fact, on gift taxes, don't you have to send a report to Washington and have that approved and the gift tax determination issued from Washington?

A. I think that was the old set-up on it, yes.

Q. Have you ever sent your report to Washington on the gift tax?

A. Yes, this is my report right here, and it is recommended for assessment right there.

Q. Have you ever sent it?

A. Yes.

Q. When did you send it?

A. July the 17th, 1950.

Q. And no assessment has been made?

A. To my knowledge, it hasn't.

Q. Have you received any letter from the gift tax section in Washington disapproving your report up to this time?

A. No, sir.

Q. Just one more question, Mr. Morgan. It is a hot afternoon and I hate to bother you. I believe you said that you did make computations; but you didn't make computations, but you checked them. Now, who did make the computations?

A. Richard W. Walker.

Q. Mr. Walker?

A. Yes.

Q. Now deceased, I believe?

A. That is correct.

Mr. Luce: That is all, Your Honor.

[fol. 89] Redirect examination.

By Mr. Davis:

Q. Well, Mr. Morgan, you say those were Mr. Walker's figures. You checked them, didn't you?

A. Yes.

Q. And you concurred in it?

A. I do.

Mr. Davis: That is all.

(Witness excused.)

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* * * * * * *

Thereupon, at the conclusion of the proceedings, the Court denied the motion to set aside the judgments and the petition for leave to withdraw the pleas of nolo contendere and also denied probation. Thereupon request was made by counsel for defendant to fix appropriate bond pending appeal and the Court thereupon took the matter under advisement and recessed further proceedings in the matter until ten o'clock Thursday morning, June 25, 1953.

At the latter date, counsel for defendant appeared and defendant appeared in person and thereupon the Court fixed the bail bond in case No. 8751 at $10,000 and in case No. 8752 at $2,500 and also required the giving of additional bond to secure the payment of the fine imposed in each case.

Thereupon the Court granted an additional stay of five

days in order to enable defendant to make the notice of appeal and to post the bond as indicated.

In United States District Court

Order Denying Motions in Arrest of Judgment, etc.

Now on this 2d day of June, 1953, the above entitled matters came duly on for hearing on the defendant's motion in arrest of judgment, motion to set aside judgment of conviction and to permit defendant to withdraw his plea of nolo contendere, as amended, and petition for probation. After an extensive hearing, during which the court heard at length argument of counsel in support of and opposition [fol. 90] to the various motions and further heard testimony of some fifteen character witnesses in support of defendant's petition for probation, the court makes the following findings of fact, which findings are to be entered in both the above captioned cases.

Findings of Fact

1. The indictments were returned on February 28, 1952, the indictment in case No. 8751 consisting of four counts, each alleging violation by the defendant of Title 26 U. S. C. Section 145(b); the indictment in case No. 8752, consisting of two counts, each alleging violation by the defendant, acting in his capacity as president of Central Theatre Company, Inc., of Title 26 U. S. C. Section 145(b).

2. On March 20, 1952, motions for bills of particular in each case were filed on behalf of the defendant and a hearing on said motion was held on May 22, 1952, at which time the defendant was represented by his retained counsel, Mr. Llewellyn A. Luce and Walter H. Maloney of Washington, D. C. and Mr. Tom Harley, Jr., of Wichita, Kansas.

3. The defendant filed his brief in support of said motions on May 29, 1952 and the court, on June 12, 1952, sustained same. The bill of particulars in each case was filed by the Government August 19, 1952 in pursuance of the above mentioned order.

4. On September 8, 1952 the defendant was arraigned in both cases, at which time he entered his plea of not guilty

as charged in the six counts in the two indictments. At the arraignment, he was represented by his counsel, Mr. Luce, Mr. Maloney and Mr. Harley.

5. On November 25, 1952, the defendant, through counsel, filed motions for further bills of particulars in each case, which motions were withdrawn from the court's consideration on the defendant's own motion, December 12, 1952.

6. Motions to dismiss in each case were filed on behalf of the defendant on January 12, 1953 and the motions were argued at length January 21, 1953 and taken under submission by the court with briefs on behalf of both parties [fol. 91] being filed. At this hearing defendant was represented by Mr. Luce, Mr. Harley and Mr. W. D. Jochems. The court, by letter to the Clerk of the Court, denied the motions to dismiss as to both cases and they were set for trial to commence the later part of January, 1953. At that time the court was informed by attorneys for the Government that the Internal Revenue Agent who investigated the case was presently on active duty in Korea that his attendance as a witness was necessary and that an application for continuance would be made by the Government if the witness could not be produced in time to testify on the date set for trial. However, the witness was available, but at defendant's request the court continued the matter until April, 1953. Both parties were advised that the cases had been set for trial April 6, 1953, at which time a jury was to be impaneled and sworn. Subsequently, and on April 6, 1953, the defendant and his counsel, Mr. Luce, Mr. Jochems and Mr. Harley being personally present, a jury was impaneled and sworn to try both cases, which had been combined.

7. On April 8, 1953, the defendant, with his counsel last above mentioned being personally present, moved to withdraw the pleas of not guilty previously entered as to all six counts in the two indictments and tendered to the court pleas of nolo contendere to counts one and three in case number 8751 and tendered the same plea to count one in case number 8752. Whereupon, the court, being advised by the United States Attorney that he acquiesced in and had no opposition to the acceptance by the court of such pleas, accepted the pleas of nolo contendere as above specified. At that time the United States Attorney, with the consent of

the Attorney General, moved to dismiss the remaining three counts, which motion was sustained by the court. The court then ordered a presentence investigation to be made and set the sentence hearing for May 5, 1953, which was later continued to May 26, 1953.

8. The sentence hearing was held on May 26, 1953, at which time the defendant, through counsel, made application for probation. The record discloses that the United States Attorney was requested by the court to state the facts of the cases at which time a statement was made which [fol. 92] included the Government's contentions as to the total civil liability to be imposed on the defendant for the years 1941 through 1948, both inclusive. After the presentment of the facts, counsel for the defendant were permitted to make statements in mitigation and both Mr. Luce and Mr. Jochems made arguments in behalf of probation for the defendant. In addition, the court inquired of the defendant whether he wished to make a statement and the defendant made a statement in his own behalf. At the conclusion thereof, the court pronounced sentence and denied the defendant's application for probation. Subsequently a motion for arrest of judgment based essentially on the same legal principal involved in the motion to dismiss heretofore mentioned in finding No. 6 was filed and argued at length at the June 23, 1953 hearing. In addition, a motion and amended motion to set aside the judgment of conviction and to permit the defendant to withdraw his pleas of nolo contendere were filed on behalf of the defendant and argued at length at the June 23 hearing. The last mentioned motion was based essentially on the contentions that defendant was not guilty of the crimes charged in the two indictments and had entered his plea on the basis of statements made by the United States Attorney and his assistant to defendant's counsel. Affidavits were filed in support of this motion by the defendant and his three attorneys. Counter affidavits were filed by the United States Attorney and his assistant denying in general that the prosecution had promised the defendant that probation would be granted on entry of his pleas of nolo contendere.

9. At the June 23 hearing, the court specifically inquired of defendant's counsel as to whether any remark or statement made by the court to defendant's counsel had influ-

enced them in advising the defendant to enter the pleas above mentioned. The court was assured by defendant's counsel and now finds that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of nolo contendere.

10. The court further finds that no promise of probation or lenience was made, either to the defendant personally or [fol. 93] to his counsel by the United States Attorney or his assistan- who handled the prosecution for the Government.

It is, therefore, ordered, adjudged and decreed that defendant's motion and arrest of judgment should be and it is hereby denied, that defendant's motion to set aside judgment of conviction and to permit defendant to withdraw his plea of nolo contendere should be and it is hereby denied, and further, that defendant's petition for probation should be and it is herewith denied.

Delmas C. Hill, Judge.

Entered July 20, 1953.

In United States District Court

Stipulation With Reference to Exhibit on Appeal—Filed July 30, 1953

It is hereby agreed and stipulated by and between the defendant (appellant) and his attorneys and the attorneys for the United States that the minutes of proceedings of conference in Washington, D. C. dated the — day of December, 1950 and introduced as an exhibit and filed with the Clerk in the proceedings of June 23, 1953 be transmitted to the United States Court of Appeals, Tenth Circuit, at Denver, Colorado with the transcript of the record on appeal and without printing.

The purpose of this stipulation is to shorten the record and make this exhibit available to the United States Court of Appeals in the event that the Court desires to inspect it.

Llewellyn A. Luce, Walter H. Maloney, Tom Harley, Jr. and W. D. Jochems, attorneys for defendant.
Robert H. Bingham, Asst. United States Attorney for the District of Kansas.

[fol. 94] Order to Transmit Original Exhibit to United States Court of Appeals, Tenth Circuit (omitted in printing)

In United States District Court

Notice of Appeal—Filed June 29, 1953

No. 8751

Appellant: Odom Farrell Sullivan, 936 Back Bay Boulevard, Wichita, Kansas.

Attorneys for Appellant: Llewellyn A. Luce, 937 Munsey Building, Washington, D. C.; Tom Harley, Jr., 516 Fourth National Bank Building, Wichita, Kansas; W. D. Jochems, Farmers & Bankers Life Building, Wichita, Kansas.

Offense: Evasion of Federal Income Taxes (26 U. S. C. 145 (b)) for the Calendar Years 1945 and 1947 under Docket No. 8751.

Plea: Nolo Contendere.

[fol. 95] Sentence and Judgment of the Court imposed and entered on May 26, 1953: Count 1 of the indictment in Case No. 8751—confined to the custody of the Attorney General for a period of 3 years and a fine in the amount of $5,000.00. Count 3 of the indictment in Case No. 8751—suspension of the imposition of sentence for a period of 3 years after appellant has served the sentence on Count 1.

Order and Decision of the Court entered on February 4, 1953, denying appellant's motion to dismiss the indictment in this cause, said motion having been filed on January 12, 1953.

Order and Decision of the Court entered on June 23, 1953, denying appellant's motion for arrest of judgment, said motion having been filed May 29, 1953.

Order and Decision of the Court entered on June 23, 1953, denying appellant's amended motion to set aside the judgment of conviction in this cause and permit the appellant to withdraw his plea of nolo contendere, said amended motion having been filed on June 12, 1953.

Order and Decision of the Court entered on June 23, 1953, denying appellant's petition for probation, said petition having been filed on June 12, 1953.

Appellant now on bail.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the orders, judgments, and sentence of the District Court for the District of Kansas entered on May 26, 1953, and from the above stated orders and decisions of the Court entered on June 23, 1953, ordering and deciding as follows:

1. Denying appellant's motion in arrest of judgment.
2. Denying appellant's amended motion to set aside the judgment of conviction in this cause and to permit the appellant to withdraw his plea of nolo contendere.
3. Denying appellant's petition for probation.

I, the above named appellant, also hereby appeal from [fol. 96] the order and decision of the court entered February 4, 1953, denying appellant's motion to dismiss the indictment.

Dated, 25th day of June, 1953.

Odom Farrell Sullivan, Appellant; Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems, by Tom Harley, Jr., Attorneys for Appellant.

In United States District Court

Notice of Appeal—Filed June 29, 1953

No. 8752

Appellant: Odom Farrell Sullivan, 936 Back Bay Boulevard, Wichita, Kansas.

Attorneys for Appellant: Llewellyn A. Luce, 937 Munsey Building, Washington, D. C.; Tom Harley, Jr., 516 Fourth National Bank Building, Wichita, Kansas; W. D. Jochems, Farmers & Bankers Life Building, Wichita, Kansas.

Offense: Evasion of Federal Income Taxes (26 U.S.C. 145 (b)) for the Calendar Year 1945 under Docket No. 8752.

Plea: Nolo Contendere.

Sentence and Judgment of the Court imposed and entered on May 26, 1953: Count 1 of the indictment in Case No. 8752—confined to the custody of the Attorney General for

a period of 3 years; that sentence to run concurrently with the sentence imposed on Count 1 of the indictment in Case No. 8751, and a fine of $8,000.00.

Order and Decision of the Court entered on February 4, 1953, denying appellant's motion to dismiss the indictment in this cause, said motion having been filed January 12, 1953.

Order and Decision of the Court entered on June 23, 1953, denying appellant's motion for arrest of judgment, said motion having been filed May 29, 1953.

Order and Decision of the Court entered on June 23, 1953, [fol. 97] denying appellant's amended motion to set aside the judgment of conviction in this cause and permit the appellant to withdraw his plea of nolo contendere, said amended motion having been filed on June 12, 1953.

Order and Decision of the Court entered on June 23, 1953, denying appellant's petition for probation, said petition having been filed on June 12, 1953.

Appellant now on bail.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the orders, judgments, and sentence of the District Court for the District of Kansas entered on May 26, 1953, and from the above stated orders and decisions of the Court entered on June 23, 1953, ordering and deciding as follows:

1. Denying appellant's motion in arrest of judgment.
2. Denying appellant's amended motion to set aside the judgment of conviction in this cause and to permit the appellant to withdraw his plea of nolo contendere.
3. Denying appellant's petition for probation.

I, the above named appellant, also hereby appeal from the order and decision of the court entered February 4, 1953, denying appellant's motion to dismiss the indictment.

Dated, 25th day of June, 1953.

Odom Farrell Sullivan, Appellant; Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems, by Tom Harley, Jr., Attorneys for Appellant.

Approved supersedeas and Appearance bonds were filed June 29, 1953.

[fol. 98] IN UNITED STATES DISTRICT COURT

ELECTION NOT TO COMMENCE SERVICE OF SENTENCE—
Filed June 29, 1953

Comes now Odom Farrell Sullivan, the defendant in the above entitled causes, and elects, under Rule 38 (2) of the Federal Rules of Criminal Procedure, not to commence service of the sentence of imprisonment imposed upon him by the court on May 26, 1953, pending appeal in these causes.

Odom Farrell Sullivan, Defendant.

IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS ON APPEAL—
Filed August 18, 1953

Now comes the defendant, Odom Farrell Sullivan, and files his statement of points to be raised on his appeal, as follows:

1. The trial court erred in denying appellant's motion in arrest of judgment.
2. The trial court erred in denying appellant's motion to set aside the judgment of conviction and denying appellant permission to withdraw his plea of nolo contendere.
3. The trial court erred in denying appellant's petition for probation.

Llewellyn A. Luce, Tom Harley, Jr., W. D. Jochems, Walter H. Maloney, by Tom Harley, Jr., Attorneys for Appellant.

[Proof of service on original.]

By orders of July 24, 1953, and August 21, 1953, the time for docketing the causes in the Court of Appeals was extended to September 26, 1953.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100-101] Argument and submission—March 15 and 16, 1954 (omitted in printing).

IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Llewellyn A. Luce and W. D. Jochems (Tom Harley, Jr., and Walter H. Maloney were with them on the brief) for Appellant.

George Templar for Appellee.

OPINION—April 9, 1954

Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges

PHILLIPS, Chief Judge:

On February 28, 1952, a duly constituted Grand Jury for the District of Kansas returned two indictments against [fol. 102] Odom Farrell Sullivan, one numbered 8751, the other 8752. The first count of the indictment in No. 8751 charged that Sullivan, on March 14, 1946, made a false and fraudulent income tax return for the year 1945, in which he understated his net income and the amount of tax due and owing thereon. Counts Two, Three and Four of such indictment charged like offenses involving the tax years 1946, 1947 and 1948, respectively.

Count One of the indictment in No. 8752 charged that Sullivan was the president of Central Theatre Company, Inc., a corporation, and that he wilfully and knowingly attempted to defeat and evade a large part of the taxes due and owing by the corporation to the United States for the calendar year 1945, by filing a false and fraudulent tax return, wherein he understated the net income of the corporation for the year 1945 and the amount of income tax due thereon. Count Two of such indictment charged a like offense, involving the tax year 1946.

On January 12, 1953, Sullivan filed motions to dismiss the indictments on the ground that the evidence concerning the violations charged was not presented to the Grand Jury pursuant to the direction of the Attorney General of the United States, as required by Executive Order No. 6166, § 5, and Circular Letter No. 2431, issued by the Attorney General to all United States Attorneys, dated August 10, 1933. Both motions were denied.

On April 8, 1953, Sullivan appeared in open court, represented by counsel of his own choosing, and acting on the advice of such counsel entered a plea of nolo contendere to Counts One and Three of the indictment in No. 8751 and Count One of the indictment in No. 8752. The remaining counts were dismissed.

On May 26, 1953, Sullivan was sentenced to imprisonment for a term of three years and to pay a fine of $5,000 on Count One in No. 8751. On Count Three in No. 8751, the imposition of sentence was suspended and Sullivan was placed on probation for a period of three years, to commence after he had [fol. 103] served the sentence under Count One. On the same day Sullivan was sentenced to imprisonment for a period of three years on Count One of the indictment in No. 8752, to run concurrently with the sentence imposed on Count One in No. 8751, and to pay a fine of $8,000.

On May 29, 1953, Sullivan filed a motion in arrest of judgment, predicated on the same grounds as the motions to dismiss referred to above.

On June 12, 1953, Sullivan filed a verified amended motion to set aside the judgment of conviction and permit him to withdraw his plea of nolo contendere in both cases.

As grounds for the amended motion Sullivan alleged that in a conference between counsel for Sullivan and the United States Attorney, Eugene W. Davis, and an Assistant United States Attorney, Robert H. Bingham, both Davis and Bingham stated that because of the condition of Sullivan's health and his character and reputation, the court would show leniency if Sullivan entered a plea of nolo contendere to two counts of the indictment in No. 8751 and one count of the indictment in No. 8752; that Mr. Davis further stated that while he would not recommend probation, he would not object to a suspension of sentence and the granting of probation. Sullivan further alleged that because of such conversa-

tions he believed he would be granted probation if he entered pleas of nolo contendere to three counts of the indictments.

On June 23, 1953, Sullivan filed a petition for probation.

Three of the lawyers who represent Sullivan filed affidavits which supported the averments of the amended motion referred to above. The United States Attorney filed an affidavit in which he averred that he refused to recommend probation and he did not recall that he had made any statement giving assurance that he would not oppose probation. Assistant United States Attorney Bingham filed an affidavit in which he stated that Mr. Davis stated to counsel for Sullivan that he would not recommend probation and that he did not state he would not oppose probation; both Davis and Bingham averred that the latter, in answer to a question from [fol. 104] one of Sullivan's counsel as to what recommendation he would make if the court requested a recommendation, stated that he would recommend a one year sentence on each of the three counts, to run consecutively, and a fine of $10,000 on each count. When Sullivan was brought before the court for sentencing, the court inquired of Mr. Davis whether he desired to make any statement. In response thereto, Mr. Davis reviewed the facts in the case, but he made no recommendation with respect to the sentence or with respect to the granting or denying of probation. Counsel for Sullivan made a statement with respect to Sullivan's character and reputation and his long record of service in public and civic affairs, and further stated that his health was not good and requested probation. The court denied the motion in arrest of judgment, the motion for leave to withdraw the pleas of nolo contendere and the application for probation. This appeal followed.

26 USCA §3740 provides:

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

This section by its terms relates only to civil proceedings. It is primarily directed to the maintenance by private persons of qui tam actions.[1]

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[1] United States v. Hess, 3 Cir., 127 F. 2d 233, 238.

Section 5 of Executive Order No. 6166, promulgated June 10, 1933, 5 U.S.C., 1946 Ed., §§124-132 is set forth in subjoined note 2.[2] The United States Attorneys are an integral [fol. 105] part of the Department of Justice[3] and the action of the United States Attorney in presenting the cases to the Grand Jury was in no sense inconsistent with such Executive Order.

Circular Letter No. 2431, after referring to §5 of Executive Order No. 6166, provides:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

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[2] "The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

[3] United States v. One 1941 Cadillac Sedan, 7 Cir., 145 F. 2d 296, 299.

Here, there was no showing that an emergency calling for immediate action did not exist. Indeed, the offenses charged in the first count of each indictment would have been barred by limitation on or about March 15, 1952,[4] and the indictments were returned on February 28, 1952.

Moreover, the Grand Jury had plenary power to investigate and return indictments for all public offenses against the United States, committed within the District of Kansas, of which it obtained legal evidence, either through the efforts of the United States Attorney, or on its own initiative.[5]

We conclude that there is nothing in this record that vitiated the two indictments returned by the Grand Jury.

The trial court found, after a full hearing on the motions, that "no promise of probation or lenience was made, either to the defendant personally or to his counsel by the United [fol. 106] States Attorney or his assistant." That finding was supported by the affidavits of the United States Attorney and the Assistant United States Attorney and is binding on this court.

Even if it be assumed that the United States Attorney promised that he would not oppose an application for probation, there is nothing in this record to indicate that he did actively oppose probation. He was under a duty to present the relevant facts with respect to the offenses charged to the court. Those facts may have indicated that probation was not appropriate, but that cannot in any sense be construed to be a violation of his alleged promise not to oppose probation.

The granting or denial of probation was a matter within the sound discretion of the trial court and there is nothing in this record to indicate an abuse of that discretion.

Affirmed.

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[4] 26 USCA § 3748.

[5] United States v. Smyth, D.C.N.D. Cal., 104 F. Supp. 283, 288-295;

Hale v. Henkel, 201 U. S. 43, 53, 54;

See also: In re Miller, 17 Fed. Cas. No. 9,552.

In United States Court of Appeals for the Tenth Circuit

Judgment—April 9, 1954

No. 4741

Ninety-Fourth Day, November Term, Friday, April 9, 1954. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Odom Farrell Sullivan, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 107] In United States Court of Appeals for the Tenth Circuit

Judgment—April 9, 1954

No. 4742

Ninety-Fourth Day, November Term, Friday, April 9th, 1954. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Odom Farrell Sullivan, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

By order of April 19, 1954, the mandates of the United States Court of Appeals were stayed for a period of thirty days from that day under provision of Paragraph 3 of Rule 28.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 747

ODOM FARRELL SULLIVAN, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.

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FILED
MAY 6 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 64

ODOM FARRELL SULLIVAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Washington 4, D. C.

WALTER H. MALONEY
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Wichita, Kansas.
Counsel for Petitioner.

WILSON - EPES PRINTING CO - RE 7-6003 - WASHINGTON 1, D. C.

INDEX

PAGE

Petition 1

Jurisdiction 2

Questions Presented 2

Statutes and Executive Orders Involved 2

Statement of the Case 4

Specification of Errors 9

Reasons for Granting the Writ 10

Conclusion 15

Appendix 17

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 17

Section 145, Title 26 United States Code and Internal Revenue Code 17

Statement of Facts upon which the Motion and Amended Motion to Withdraw the Plea of Nolo Contendere were based 18

Speech of Senator Robinson, of Arkansas, in the Congressional Record for June 10, 1933 23

Index of Authorities

14 American Jurisprudence, Section 287, pp. 961-962 .. 13

Bergen v. United States, 145 F. (2d) 181, 187 (CCA 8) 13, 14

Kercheval v. United States, 274 U.S. 220, 224, 71 L. Ed. 1009, 1012 ..... 12, 14

State v. Hovis, 353 Mo. 602, 183 S.W. 2d 147 14

State ex rel. Kaser v. Leonard, 102 Pac. 2d 197, 129 A.L.R. 1125 11

United States v. Chouteau, 102 U.S. 603 11

United States v. La. Franca, 282 U.S. 568 11

United States v. William G. Lias, 173 F. (2d) 685 (CA 4) 13, 14, 15

United States v. McKee, 4 Dill 128 11

United States v. Western Chemical & Mfg. Co., 78 F. Supp. 983 14

Von Moltke v. Gillies, 332 U.S. 708, 729 ..... 12, 14

IN THE

Supreme Court of the United States

October Term, 1953

No.

ODOM FARRELL SULLIVAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on April 9, 1954 (R. 106-107), based on an opinion of said court rendered on April 9, 1954 (R. 101), affirming the judgment and order of the United States District Court for the District of Kansas. The opinion is not as yet officially reported but may be found at page 101 of the record. The order and judgment of the District Court is unreported but appears at page 89 of the record.

JURISDICTION

The opinion was promulgated on April 9, 1954 (R. 101) and the judgment of the court below was entered on April 9, 1954 (R. 106-107). The jurisdiction of this court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether the indictments in these cases should have been dismissed by the District Court on the ground that the orderly procedure required by law was not followed by the United States Attorney in presenting these cases to the Grand Jury and whether the Grand Jury proceedings were irregular and unlawful because the Attorney General of the United States had not directed that the cases be presented to the Grand Jury as required by Executive Order No. 6166, Section 5; Section 3740, Title 26 of the United States Code and as provided by Circular Letter No. 2431 dated August 10, 1933 addressed to "All United States Attorneys", issued by the Attorney General of the United States in compliance with said Executive Order.

2. Whether the District Court erred in refusing to grant petitioner's motion and amended motion to permit petitioner to withdraw his plea of nolo contendere and to set aside the judgment of conviction entered in the case.

STATUTES AND EXECUTIVE ORDERS INVOLVED

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) provides as follows:

> "The functions of prosecuting in the courts of the United States claims and demands by and offenses against, the Government of the United States, and of

defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

Section 3740, Title 26 of the Internal Revenue Code and the United States Code provides:

"AUTHORIZATION TO COMMENCE SUIT

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. 53 Stat. 460."

Section 3761, Title 26 of the Internal Revenue Code and United States Code provides:

> "COMPROMISES—(a) AUTHORIZATION.
> "The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. may be found at page 17 of the Appendix, *infra*.

Section 145, Title 26, United States Code and Internal Revenue Code, may be found at page 17 of the Appendix, *infra*.

STATEMENT OF THE CASE

On January 31, 1952, Llewellyn A. Luce, of counsel for the petitioner, was advised as follows, by the Acting Assistant Attorney General (R. 25):

"United States
Department of Justice
Washington 25, D. C.
January 31, 1952

"ENS:BK:11
5-29-387

"Llewellyn A. Luce, Esq.,
937 Munsey Building
Washington 4, D. C.

RE: O. F. Sullivan,
Central Theatre Co., Inc.
Wichita, Kansas.

"Dear Mr. Luce:

"We have on file your request that a conference be granted you in the event the above-named case is

referred to this office with the recommendation for criminal prosecution.

"This is to advise that we are now in receipt of a recommendation by Acting Regional Counsel Joseph B. King that criminal proceedings be instituted against O. F. Sullivan for individual income tax evasion as to the years 1946, 1947 and 1948, and for corporate evasion as to the year 1946.

"This case has been assigned to Mr. Ben Kohler, Jr., of my staff. In view of the fact that the first year involved is 1946 a conference in this matter cannot be held until after the present March 15th statutory deadline. As soon as possible after March 15th, however, a conference date will be proposed.

Sincerely yours,

For the Attorney General,
ELLIS N. SLACK,
Acting Assistant Attorney General."

On February 28, 1952, and while the cases of the petitioner and Central Theatre Co., Inc. were under consideration by the Attorney General of the United States in Washington, D. C. and before March 15, 1953 referred to in the letter from the Assistant Attorney General above quoted (R. 25-26), two indictments were returned against the petitioner by a Grand Jury in the District of Kansas impaneled at Topeka, Kansas (R. 1-3).

The first indictment, Case No. 8751, consisted of four counts and charged the petitioner under Title 26, United States Code, Section 145 (b), with having willfully and knowingly filed false and fraudulent Federal income tax returns for the calendar years 1945, 1946, 1947 and 1948, with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 1-3).

The second indictment, Case No. 8752, consisted of two counts and charged the petitioner under Title 26, United States Code, Section 145 (b), with having will-

fully and knowingly filed or caused to be filed false and fraudulent Federal income tax returns for the calendar years 1945 and 1946 of Central Theatre Company, Inc. with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 3-4).

On September 8, 1952, the petitioner was arraigned in the United States District Court for the District of Kansas in both cases and entered his plea of "not guilty" as charged in the counts of the two indictments (R. 4).

On August 12, 1952 petitioner filed motions to dismiss the two indictments on the ground that the cases were not presented to the Grand Jury pursuant to the direction of the Attorney General of the United States, as required by Executive Order No. 6166, Section 5; Circular Letter addressed on August 10, 1933 to "All United States Attorneys" issued for the Attorney General of the United States in compliance with said Executive Order, and Section 3740, Title 26 of the Internal Revenue Code (United States Code) (R. 23-24).

The motions to dismiss were denied by the District Court by letter to the clerk of the court (R. 91) and the cases were set for trial during April, 1953 (R. 91).

On April 6, 1953 a jury was impaneled and sworn to try both cases.

On April 8, 1953, the petitioner with his counsel being personally present, moved to withdraw the pleas of not guilty previously entered as to all six counts in the two indictments and tendered to the court pleas of *nolo contendere* to counts one and three in Case No. 8751 and tendered the same plea to count one in Case No. 8752. Whereupon, the court, being advised by the United States Attorney that he acquiesced in and had no opposition to the acceptance by the court of such pleas, accepted the

pleas of *nolo contendere* as above specified. (R. 26-27) At that time the United States Attorney, with the consent of the Attorney General, moved to dismiss the remaining three counts, which motion was sustained by the court. The court then ordered a presentence investigation to be made and set the sentence hearing for May 5, 1953, which was later continued to May 26, 1953 (R. 91).

On May 26, 1953 the petitioner was adjudged and committed by the District Court as follows (R. 42):

> "It is adjudged that the defendant is guilty as charged and convicted.
>
> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for the imprisonment for a period of three (3) years on count 1, to run concurrently with the sentence this date imposed on count one of Case No. 8751, and pay a fine in the sum of $8,000.00 and the costs of this action.
>
> "It is adjudged that count 2 is dismissed on motion of the United States Attorney. Stay of execution is granted for 30 days."

On May 29, 1953 petitioner filed with the District Court a motion to set aside judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* (R. 43), pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure.

On May 29, 1953, petitioner also filed a motion in arrest of judgment (R. 43).

On June 12, 1953, petitioner filed with the court an amended motion to set aside judgment of conviction and permit appellant to withdraw his plea of *nolo contendere* (R. 44-50).

On June 12, 1953, petitioner also filed a petition for probation (R. 51-57).

A statement of the facts upon which the motion and amended motion to withdraw the plea of *nolo contendere* were based may be found at page 18 of the Appendix, infra.

On June 23, 1953, a hearing was held on petitioner's motion in arrest of judgment, motions to set aside the judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* and the petition for probation (R. 92).

At the hearing of June 23, 1953, thirteen prominent citizens of Wichita, Kansas appeared, testified and recommended probation for appellant (R. 76-78).

Bert N. Morgan, a special agent of the Intelligence Unit, Bureau of Internal Revenue, also appeared, testified and was cross-examined as to the civil liabilities of appellant (R. 79-89).

At the conclusion of the hearing the District Court denied (R. 93):

Petitioner's motion in arrest of judgment;

Petitioner's motion and amended motion to set aside judgment of conviction and to permit appellant to withdraw his plea of *nolo contendere;* and,

Petitioner's petition for probation.

The petitioner thereupon duly filed notice of appeal to the United States Court of Appeals for the Tenth Circuit in both cases, Nos. 8751 and 8752 (R. 94-97, inclusive).

On August 18, 1953, petitioner filed his Statement of Points on appeal (R. 98) as follows:

1. The trial court erred in denying petitioner's motion in arrest of judgment.

2. The trial court erred in denying petitioner's motion to set aside the judgment of conviction and denying petitioner permission to withdraw his plea of *nolo contendere*.

3. The trial court erred in denying petitioner's *petition* for probation.

On April 9, 1954 the United States Court of Appeals for the Tenth Circuit rendered an opinion affirming the decision, order and judgment of the District Court (R. 101). Judgment was entered by the Court of Appeals on April 9, 1954 (R. 106).

SPECIFICATION OF ERRORS

The Honorable Circuit Court of Appeals erred:

1. In affirming the order and judgment of the District Court denying petitioner's motion to dismiss the indictments and in arrest of judgment and denying petitioner's motions to withdraw his plea of *nolo contendere* and to set aside the judgment of conviction.

2. In failing to properly apply to this case the provisions of Executive Order No. 6166 as interpreted by the Attorney General of the United States in Circular Letter No. 2431 and in holding that there was no showing by appellant that an "emergency" as mentioned in said Circular Letter did not exist at the time of the indictment.

3. In holding and deciding that Section 3740, Title 26 of the United States Code relates only to civil proceedings.

4. In failing to hold and decide that to correct "manifest" injustice the District Court should have set aside the judgment of conviction and should have permitted the appellant to withdraw his plea of "*nolo contendere*".

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court. This case involves the interpretation of an Executive Order (No. 6166) and a Federal statute, Section 3740, Title 26, U.S.C. (53 Stat. 460).

Petitioner respectfully submits that Executive Order No. 6166 should be interpreted just as the Attorney General of the United States has himself interpreted it by Circular Letter No. 2431 in which he directed United States Attorneys to present evidence to a Grand Jury concerning violations of Internal Revenue laws only when authorized to do so by the Attorney General's Office unless emergency calls for immediate action. (p. 3 this petition) The record here clearly shows that no emergency existed in this case.

The Acting Assistant Attorney General notified counsel for petitioner on January 31, 1952 that in view of the fact that the first year involved was 1946 a conference on the matter could not be held until after March 15, 1952 (R. 25-26). However, in less than one month after said notification the United States Attorney presented the evidence to a Grand Jury at Topeka, Kansas and petitioner was indicted (R. 1 and 3). The question of a violation of the Internal Revenue laws for the year 1945 was not even presented to the Attorney General for his consideration (R. 25-26).

The Executive Order and resulting Circular Letter had the force and effect of law in regard to supervision and procedure in all tax litigation. Executive orders as well as department regulations issued pursuant to statutory authorization have the force and effect of law of which the courts are bound to take cognizance. (See 54 Am. Jur., United States, Section 37, Proclamations and Executive Orders, Page 553, and cases cited therein, and

State ex rel. Kaser v. Leonard, 102 Pac. 2d 197, 129 A.L.R. 1125, which outlines the Federal cases on the subject.

Petitioner also relies on Section 3740, Title 26, U.S.C. (p. 3 this petition), which has not been construed by this Court in relation to the point involved. It is submitted that this section of the statute does not relate merely to civil actions, as the Court of Appeals held, but that it covers all tax litigation including prosecutions under Section 145(b) U.S.C. Petitioner finds no opinion of the Attorney General, regulation, ruling or circular letter limiting said section to civil proceedings.

The pertinent section of the statute uses the word "suit". The word "suit" is a comprehensive term which may be and is sometimes used to include criminal proceedings, such as an indictment or information; 1 Corpus Juris Secundum, page 962 and cases there cited. A criminal case has been defined as an action, suit or cause instituted to punish an "infraction of the criminal law". 1 Corpus Juris Secundum, p. 951.

Section 3740 also uses the words "for the recovery of • • • any fine, penalty, or forfeiture". Section 145(b) U.S.C., under which petitioner was indicted, is a penalty section for tax evasion providing both for a fine and/or imprisonment (App. p. 17). "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603; *United States v. La Franca*, 282 U.S. 568; *United States v. McKee*, 4 Dill 128.

We think that failure to strictly follow the provisions of Section 5, Executive Order No. 6166; Circular Letter No. 2431; and Section 3740, Title 26 U.S.C. would seriously impair the orderly administration of justice in

revenue cases and subject taxpayers to the whims, caprices and prejudices of minor officers in local communities. We believe that it was the intent of Congress that the sole responsibility should rest with the Attorney General (Speech of Senator Robinson of Arkansas, Congressional Record, June 10, 1933, page 5615, App. p. 23).

The decision of the Court of Appeals is not in accord with the well established principal that a defendant may be permitted to withdraw a plea of "guilty" or *nolo contendere* "to correct manifest injustice" Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.A. (App. 17).

In his verified amended motion to withdraw his plea, petitioner stated that although innocent he entered his plea of *nolo contendere* because he was led to believe and did believe that under such a plea he would receive a substantial fine and suspended sentence and be placed upon probation (R. 44). A full statement of the facts, outlining the events and describing the conferences between counsel for petitioner and the United States Attorney which led to the entry of the plea may be found at pages 18-23 of Appendix, *infra*.

In *Kercheval v. United States*, 274 U.S. 220, 224, 71 L. Ed. 1009, 1012, this Court observed:

> "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

There is no question in this case but that the petitioner was advised by his three attorneys (who took part in the conferences with the United States Attorney) to enter the plea of *nolo contendere* (R. 62).

A pronouncement by Mr. Justice Frankfurter in a concurring note in *Von Moltke v. Gillies*, 332 U.S. 708, 729, is that while an accused, with the considered appro-

val of the court, may competently and intelligently waive a right guaranteed by the Constitution—

> "There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered • • • a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences."

"• • • The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty • • •." 14 American Jurisprudence, Section 287, pp. 961-962; *United States v. William G. Lias*, 173 F. (2d) 685 (CA 4).

In *Bergen v. United States* (C.C.A. 8, 1944), 145 F. (2d) 181, 187, the United States Court of Appeals stated:

> "We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty."

Judge Riddick, speaking for the court in the *Bergen* case, noted also that:

> "The court's discretion should be *exercised liberally* • • •" (Page 187) (Italics ours.)

One of the fundamental questions involved under this issue is:

> "Was the appellant misled?"
> "It is immaterial whether the misleading was intentionally or unintentionally done."

"The material inquiry is: Was the defendant misled, or under a misapprehension, at the time he entered his plea?"

State v. Hovis (1944),
353 Mo. 602, 183 S.W. 2d 147.

In *State v. Hovis, supra,* the Missouri Supreme Court observed:

"We do not mean to say that we think the prosecuting attorney intentionally misled the appellant, but we do think that he was misled. *The question before us is: was the appellant misled? It is immaterial whether the misleading was intentionally or unintentionally done. The material inquiry is: Was the defendant misled, or under a misapprehension,* at the time he entered his plea of guilty? While it may be true, as stated by the prosecuting attorney that he did not in so many words tell defendant that if he would make a confession that he would be paroled, yet we think the statements made by the prosecutor to the defendant were such as did cause him to believe that he would be paroled if he entered a plea of guilty" (Italics ours).

See also *United States v. Western Chemical & Mfg. Co.,* 78 F. Supp. 983.

We think that the decision of the Court of Appeals fails to follow the principles enunciated by this Court in *Kercheval v. United States,* supra, and *Von Moltke v. Gillies,* supra; also that the decision of the court below conflicts with the decisions of the Eighth and Fourth Circuits in *Bergen v. United States,* supra, and *United States v. Lias,* supra.

The determination by the petitioner Sullivan to plead *nolo contendere* involved a waiver by him of his constitutional right to a trial by jury guaranteed by Article III, Section 2 of the Constitution of the United States and by the Sixth Amendment to that Constitution. He asks only

as a matter of simple justice to be permitted to withdraw the plea.

In *United States v. Lias,* supra, the Court of Appeals quoted from the memorandum of the District Court Judge, permitting the defendant to withdraw his plea of guilty. As observed by the District Court Judge, "• • • The only thing that the government has lost is a comparatively short time in which a trial might have been held. That trial can still be held. No one will be in a worse position in this case because of this action, unless it is defendant himself, the party at whose instance it is being taken."

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LLEWELLYN A. LUCE
937 Munsey Building,
Washington 4, D. C.

WALTER H. MALONEY
526 Investment Building,
Washington 5, D. C.

W. D. JOCHEMS
305 Farmers & Bankers Life Bldg.
Wichita, Kansas.

TOM HARLEY, JR.
Fourth National Bank Bldg.
Wichita, Kansas.
Counsel for Petitioner.

CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE
WALTER H. MALONEY

APPENDIX

Rule 32 (d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides as follows:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea".

Section 145, Title 26, United States Code and Internal Revenue Code provides:

> "Sec. 145. Penalties.
>
> "(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> "(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law,

be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Statement of Facts upon which the Motion and Amended Motion to Withdraw the Plea of Nolo Contendere Were Based.

The cases had been set for April 5, 1953, for the impaneling of a jury and for trial for April 14th (R. 59). On the night of April 5th, Mr. Luce arrived in the City of Wichita and was met at the station by Mr. Harley; both of them going to the Lassen Hotel where Mr. Luce had reservations. Mr. Luce and Mr. Harley were in Mr. Luce's room for only a few minutes when they received a telephone call from Mr. Davis, the United States District Attorney, inviting them down to his room, which invitation was accepted (R. 59 and 64).

On the morning of April 6th, a jury was selected, impaneled, sworn and excused to return April 14th for the trial of the cases (R. 64).

On the night of April 6th, Mr. Davis called Mr. Luce and invited him and Mr. Harley down to his room. Mr. Luce informed Mr. Davis that he and Mr. Harley were in conference with their client and witnesses and wouldn't be able to accept the invitation. Approximately forty-five minutes later, Mr. Davis again called and renewed his invitation, which was accepted (R. 64). Mr. Luce and Mr. Harley were met by Mr. Davis and Mr. Bingham, an Assistant United States District Attorney. After some conversation, Mr. Davis asked Mr. Luce and Mr. Harley why they didn't settle the cases by pleading the defendant guilty to one count of each indictment, to which Mr. Harley replied that the defendant would not plead guilty to any count because the defendant maintained and insisted that he was not guilty of any fraudulent conduct (R. 60 and 64).

Mr. Bingham was of the opinion that the defendant should plead to three counts and asked if the defendant would enter a plea of *nolo contendere* to three counts of the two indictments (R. 64). During the discussion as to whether the defendant should and would enter a plea of *nolo contendere* to three counts of the indictments, Mr. Bingham informed Mr. Luce and Mr. Harley that he thought the defendant was subject to Berger's disease, that according to their information the defendant's brother had died of the disease, that his sister had to have a leg amputated because of the disease and that he was of the opinion the court would be lenient with anyone of the character and reputation of this defendant who had a medical background such as that (R. 60). Mr. Davis stated that he had nothing personal against the defendant and that he was of the opinion that the court would show leniency to a man of defendant's character and reputation (R. 60 and 65).

After more conversation of like tenor, Mr. Davis was asked by Mr. Harley if he would recommend probation or suspended sentence in the event said defendant should enter pleas of *nolo contendere* (R. 60). Mr. Davis stated that it was not the practice of the court to ask him for a recommendation but that he had no objection to probation or suspended sentence and to be assured that he would not oppose probation or suspended sentence (R. 61).

The major dispute as to what transpired in the conferences the night of April 6th and the night of April 7th is whether Mr. Davis stated that he had no objection to probation or suspended sentence and would not object to probation or suspended sentence. Mr. Luce in his affidavit states that such a statement was made (R. 60). Mr. Jochems in his affidavit states that Mr. Davis stated that he would not oppose probation or suspended sentence (R. 58). Mr. Harley states in his affidavit that

such a statement was made (R. 61). Mr. Bingham in his affidavit states that no such statement was made (R. 73). Mr. Davis in his affidavit states that he recalls making no such statement but that he did state that he "did not propose to take a position one way or the other, and hoped that the court would not ask him" (R. 72).

On the morning of April 7th a conference was had between Mr. Davis and Mr. Bingham and counsel for defendant as to whether the Department of Justice would approve the suggested settlement (R. 66). In the afternoon of the same day Mr. Luce and Mr. Jochems conferred with Mr. Davis and they went into the chambers of Judge Hill to ascertain whether His Honor would accept a plea of *nolo contendere*. While in his chambers, Judge Hill inquired about civil liabilities and stated in substance that even in cases where defendant pleaded guilty and was placed on probation he always made it plain that the plea was entered without prejudice to defendant's right to dispose of his civil liabilities (R. 58 and 66).

All of the aforesaid facts were related to the defendant and after lengthy discussion, at approximately 12 o'clock midnight, the defendant reluctantly agreed to enter a plea of *nolo contendere* to the three counts after being advised by counsel that they were satisfied in their own minds that both Mr. Davis and Mr. Bingham were sincere in everything they had said and that they felt from their conversations that Mr. Davis and Mr. Bingham actually favored said defendant receiving probation or suspended sentence (R. 62).

The following day, April 8th, the defendant entered pleas of *nolo contendere* to Count One and Count Three in Case No. 8751 and upon motion of the Government Counts Two and Four were dismissed. Defendant also entered a plea of *nolo condentere* to Count One of

Case No. 8752 and upon motion of the Government Count Two was dismissed. The cases were then passed for pre-sentence investigation.

On the 26th day of May, 1953, the cases came on to be heard for sentencing of the defendant, at which time Mr. Davis was asked by the court if he desired to make a statement, to which Mr. Davis replied that, perhaps, he should (R. 28).

Mr. Davis got up to make his statement and his former friendly attitude toward the defendant changed from one of friendliness and consideration to one of vindictiveness which is hard to observe from the printed word.

In Mr. Davis' statement to the court (R. 28 to 32, incl.) he not only discussed the counts to which a plea had been entered but he went into detail as to the counts which had been dismissed by the Government (R. 29).

In addition to discussing the counts of the indictments which had been dismissed, Mr. Davis went into detail relative to the claimed civil liabilities of the defendant for the years 1941 to 1948 inclusive. For the year 1948, which is Count Four of the indictment in Case No. 8751 and which had been dismissed by the Government, Mr. Davis stated the income of the defendant for that year to be $138,000.00 (R. 30). Said count alleges the actual income of the defendant to be $82,027.15 (R. 2). The amount of $138,000.00 is the amount claimed by the Government as defendant's civil tax liability and is far in excess of the amount claimed by the Government in the criminal case. In Mr. Davis' statement for said year he not only discussed an amount in excess of the amount stated in the indictment but he discussed at some length the fact that such a large amount of income had not been reported for said year (R. 30).

Mr. Davis stated the corporate deficiency to be $57,679.29 (R. 34) whereas the deficiency claimed in both counts of the indictment, one of which had been dismissed, was $5,578.07 (R. 3). He also stated the personal deficiency of the defendant to be $186,899.62 (R. 34) when as a matter of fact all of the counts in Case No. 8751, two of which had been dismissed, only show a claimed deficiency of $52,949.20 (R. 1). In addition to claimed deficiencies for income taxes, Mr. Davis stated the defendant owed $17,422.51 in gift taxes (R. 34). There had never been any indication or claim that the defendant owed any gift taxes nor were they involved in the present action.

Mr. Davis further informed the court that, according to the Agent's report, it was a "painstaking, teeth-puiling, type of endeavor" to obtain the facts (R. 32). That the defendant obtained "skim-offs" from the Civic (R. 32) and Central Theatres (R. 32) He stressed the various bank accounts of the defendant (R. 33 and 34).

At the time of making his statement to the court, Mr. Davis was reading from the report of the Agent, Mr. Walker, who was then dead (R. 33). At the time of Agent Walker's death he was no longer with the Bureau and was charged with kidnapping and robbery in the District Court of Sedgwick County, Kansas.

Mr. Davis in his statement used the amounts claimed to be owed by the defendant in the audit made by the Special Agent's Office for the years 1941 to 1948, inclusive (R. 81). The amounts of these claimed civil liabilities were unknown to the defendant at this time (R. 35) and as stated by Mr. Morgan in his cross-examination it is not the policy of the Bureau to inform the defendant of his civil liabilities when there is a possibility of criminal action being brought (R. 83).

Mr. Davis stated that "• • • the Government feels that it has figures to establish that there was unreported income of the terrific total of $319,000.00 and a deficiency

in tax for those particular years of $186,000.00" (R. 31). These figures and amounts were even questionable in the mind of the Special Agent, Mr. Morgan. Mr. Morgan in his cross-examination by Mr. Luce stated that their figures for the years 1941 to 1945, inclusive, were not computed on the net worth basis and asked Mr. Luce to define net worth; that the figures computed for said years were on a hybrid system (R. 84). Mr. Morgan further testified that for the year 1948 the report does not recognize the sale of the Enid properties as capital gain; that there might be a difference of opinion in determining net worth adjustment and questions of law (R. 87). Mr. Morgan also testified that the defendant had not been notified as to any gift tax liability (R. 88).

It is perfectly true that Mr. Davis did not in so many words recommend to Judge Hill any sentence that the defendant should receive but in his statement to the court he said everything that he could possibly say to prejudice the court against this defendant. (R. 31)

The sentence of the Court followed (R. 42). Thereafter the petitioner filed his motions to withdraw the plea.

Speech of Sen. Robinson, of Arkansas, in the Congressional Record for June 10, 1933, on Page 5615:

• • • •

> "The fifth feature of the Executive Order has to do with claims by or against the United States. The responsibility of prosecuting and defending the suits in which the United States is a party, is governed by a multiplicity of laws which are a maze of conflicting and anomalous provisions. District Attorneys and Marshalls are responsible to the Attorney General. Nevertheless, certain agencies of the Government have the right to issue binding instructions to Attorneys and Marshals regarding the prosecution of suits. The Solicitor of the Treasury, who is in point of law a subordinate of the Attorney General, has the anomalous authority of final decision in certain mat-

ters without respect to the judgment of the Attorney General. It was clearly the intent of the law creating the Department of Justice that the Attorney General should have responsibility for prosecuting and defending suits to which the United States is a party, and the whole conflict comes from failure to properly amend antecedent laws.

"The order gives effect to the legislative intent respecting the Department of Justice and centers in the Attorney General the sole responsibility for the conduct of suits. The order in no wise diminishes the present authority of the various departments in respect to controversies before they get into the courts, but it provides that, once the Attorney General is called upon to act in the matter, thereafter his judgment is to be conclusive. This is highly desirable from the standpoint of sound organization and it will be productive, perhaps not of saving any actual expense, but of savings due to bettering the administration of court matters."

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Supreme Court of the United States

OCTOBER TERM, 1954

NO. 64

ODOM FARRELL SULLIVAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR PETITIONER

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Statutes and Executive Order Involved 2

Questions Presented 3

Statement of the Case 4

Summary of Argument 9

Argument 13

I. The orderly procedure required by law was not followed in presenting these cases to the Grand Jury. Therefore the court below erred in failing to hold that the Grand Jury proceedings were irregular and unlawful. The petitioner's motions to dismiss the indictments and in Arrest of Judgment should have been granted by the District Court 13

II. The District Court erred in refusing to grant petitioner's motion and amended motion to set aside the judgment of conviction and to permit petitioner to withdraw his plea of nolo contendere 23

Conclusion 30

Appendix 32

Citations

Authorities:

14 Am. Jur. 29

54 Am. Jur., Section 37 ..... 10, 17

Bergen v. United States (CA 8) 145 F. (2d) 181, 187 ..... 12, 27

Botany Worsted Mills v. United States, 278 U.S. 282 21

Coffey v. United States, 116 U.S. 436 20

I Corpus Juris Secundum 11, 19

Kercheval v. United States, 274 U.S. 220, 224,

PAGE

71 L. Ed. 1009, 1012 ..... 12, 27, 28
Olson v. Mellon, 4 F. Supp. 947, 950 18
Patton v. United States, 281 U.S. 276, 312, 74 L. Ed. 853, 870 28
Spies v. United States, 317 U.S. 492 19
State v. Hovis, 353 Mo. 602, 183 S.W. 2d 147 27
State ex rel. Kaser v. Leonard, 192 Pac. 2d 197, 129 A.L.R. 1125 ..... 10, 18
Stone v. United States, 167 U.S. 178 20
United States v. Beebe, 180 U.S. 343, 351 21
United States v. Chouteau, 102 U.S. 603 ..... 11, 19
United States v. Glidden Co. et al. (CA 6), 119 F. (2d) 235, 246 22
United States ex rel. Marcus v. Hess (CA 3), 127 F. (2d) 233, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 20
United States v. La Franca, 282 U.S. 568 ..... 11, 19
United States v. William G. Lias (CA 4) 173 F. (2d) 685 ..... 12, 29
United States v. McKee, 4 Dill 128 ..... 11, 19
United States v. Tillinghast, 55 F. (2d) 279, 283 18
United States v. Western Chemical & Mfg. Co., 78 F. Supp. 983 29
Von Moltke v. Gillies, 332 U.S. 708, 729 ..... 12, 28

Statutes:

PAGE APP. PAGE

Internal Revenue Code, Title 26:
Section 145 ..... 3 32
Section 3740 3
Section 3761 3

Executive Orders, Circular Letter and Rules:

Executive Order No. 6166, Section 5 (5 U.S.C. 1946 Ed., Section 124-132) 2, 13
Circular Letter No. 2431 ..... 2, 15
Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.A. 3 32

PAGE APP. PAGE

Miscellaneous:

Speech of Senator Robinson of Arkansas, Congressional Record June 10, 1933, page 5615 ..... 14 38
Annual Report of the Attorney General for the fiscal year ended June 30, 1940 15
Senate Reports, Vol. 5, 76th Congress, 1st Session, 1939 17

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The order and judgment of the United States District Court for the District of Kansas is unreported but appears at pages 88-92 of the record. It was entered from the bench by the court on June 23, 1953 (R. 88) and reduced to writing and entered by the court on July 20, 1953 (R. 89-92).

The opinion of the United States Court of Appeals for the Tenth Circuit was promulgated on April 9, 1954 and the judgment of said court was entered on April 9, 1954 (R. 102). The opinion of the United States Court of Appeals is reported at 212 F. (2d) 125.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

Certiorari was granted by this Court on June 7, 1954 (R. 103).

STATUTES AND EXECUTIVE ORDERS INVOLVED

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) provides as follows:

> "The functions of prosecuting in the courts of the United States claims and demands by and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer are transferred to the Department of Justice.
>
> "As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.
>
> "For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.
>
> "Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

> "In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury

concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

Section 3740, Title 26 of the Internal Revenue Code and the United States Code provides:

"AUTHORIZATION TO COMMENCE SUIT

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. 53 Stat. 460."

Section 3761, Title 26 of the Internal Revenue Code and United States Code provides:

"COMPROMISES—(a) AUTHORIZATION.

"The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. may be found at page 32 of the Appendix, *infra*.

Section 145, Title 26, United States Code and Internal Revenue Code, may be found at page 32 of the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether the indictments in this case should have been dismissed by the District Court on the ground that the orderly procedure required by law was not followed

by the United States Attorney in presenting these cases to the Grand Jury and whether the Grand Jury proceedings were irregular and unlawful because the Attorney General of the United States had not directed that the case be presented to the Grand Jury as required by Executive Order No. 6166, Section 5; Section 3740, Title 26 of the United States Code and as provided by Circular Letter No. 2431 dated August 10, 1933 addressed to "All United States Attorneys", issued by the Attorney General of the United States in compliance with said Executive Order.

2. Whether the District Court erred in refusing to grant petitioner's motion and amended motion to permit petitioner to withdraw his plea of nolo contendere and to set aside the judgment of conviction entered in the case.

STATEMENT OF THE CASE

On January 31, 1952, Llewellyn A. Luce, of counsel for the petitioner, was advised as follows, by the Acting Assistant Attorney General (R. 25-26):

United States
Department of Justice
Washington 25, D. C.
January 31, 1952

"ENS:BK:11
5-29-387
"Llewellyn A. Luce, Esq.,
937 Munsey Building,
Washington 4, D. C.

RE: O. F. Sullivan
Central Theatre Co., Inc.
Wichita, Kansas.

"Dear Mr. Luce:

"We have on file your request that a conference be granted you in the event the above-named case is referred to this office with the recommendation for criminal prosecution.

"This is to advise that we are now in receipt of a recommendation by Acting Regional Counsel Joseph B. King that criminal proceedings be instituted against O. F. Sullivan for individual income tax evasion as to the years 1946, 1947 and 1948, and for corporate evasion as to the year 1946.

"This case has been assigned to Mr. Ben Kohler, Jr., of my staff. In view of the fact that the first year involved is 1946 a conference in this matter cannot be held until after the present March 15th statutory deadline. As soon as possible after March 15th, however, a conference date will be proposed.

Sincerely yours,
For the Attorney General,
ELLIS N. SLACK,
Acting Assistant Attorney General."

On February 28, 1952, and while the case of the petitioner and Central Theatre Co., Inc. were under consideration by the Attorney General of the United States in Washington, D. C. and before March 15, 1952 referred to in the letter from the Assistant Attorney General above quoted (R. 25-26), two indictments were returned against the petitioner by a Grand Jury in the District of Kansas impaneled at Topeka, Kansas (R. 1-4).

The first indictment, Case No. 8751, consisted of four counts and charged the petitioner under Title 26, United States Code, Section 145(b), with having willfully and knowingly filed false and fraudulent Federal income tax returns for the calendar years 1945, 1946, 1947 and 1948, with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 1-3).

The second indictment, Case No. 8752, consisted of two counts and charged the petitioner under Title 26, United States Code, Section 145(b), with having willfully and knowingly filed or cause to be filed false and fraudulent Federal income tax returns for the calendar years 1945

and 1946 of Central Theatre Company, Inc. with the Collector of Internal Revenue for the Internal Revenue Collection District of Kansas at Wichita, Kansas (R. 3-4).

On September 8, 1952, the petitioner was arraigned in the United States District Court for the District of Kansas in both cases and entered his plea of "not guilty" as charged in the counts of the two indictments (R. 5).

On January 12, 1953, the petitioner filed motions to dismiss the two indictments on the ground that the cases were not presented to the Grand Jury pursuant to the direction of the Attorney General of the United States, as required by Executive Order No. 6166, Section 5; Circular Letter addressed on August 10, 1933 to "All United States Attorneys" issued for the Attorney General of the United States in compliance with said Executive Order, and Section 3740, Title 26 of the Internal Revenue Code (United States Code) (R. 23-24).

The motions to dismiss were denied by the District Court by letter to the clerk of the court and without a written opinion (R. 90).

On April 6, 1953 a jury was impaneled and sworn to try both cases.

On April 8, 1953, the petitioner with his counsel being personally present, moved to withdraw the pleas of not guilty previously entered as to all six counts in the two indictments and tendered to the court pleas of *nolo contendere* to counts one and three in Case No. 8751 and tendered the same plea to count one in Case No. 8752. Whereupon, the court, being advised by the United States Attorney that he acquiesced in and had no opposition to the acceptance by the court of such pleas, accepted the pleas of *nolo contendere* as above specified. (R. 26-27). At that time the United States Attorney, with the consent of the Attorney General, moved to dismiss the remaining three counts, which motion was sustained by the

court. The court then ordered a presentence investigation to be made and set the sentence hearing for May 5, 1953, which was later continued to May 26, 1953 (R. 40-41).

On May 26, 1953 the petitioner was adjudged and committed by the District Court as follows in Case No. 8751 40-41).

> "It Is Adjudged that the defendant is guilty as charged and convicted.
>
> "It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years, and pay a fine in the sum of $5000.00 on count 1, and pay the costs of this action; on count 3 imposition of sentence is suspended for a period of three (3) years, after the defendant has served the sentence on count 1.
>
> "It is adjudged that counts 2 and 4 are dismissed on motion of the United States Attorney. Stay of execution for 30 days is hereby granted."

Petitioner was adjudged and committed as follows in Case No. 8752 (R. 41):

> "It Is Adjudged that the defendant is guilty as charged and convicted.
>
> "It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on count 1, to run concurrently with the sentence this date imposed on count one of case No. 8751, and pay a fine in the sum of $8000.00 and the costs of this action.
>
> "It Is Adjudged that count 2 is dismissed on motion of the United States Attorney. Stay of execution is granted for 30 days."

On May 29, 1953 petitioner filed with the District Court a motion to set aside judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* (R. 42), pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.

On May 29, 1953, petitioner also filed a motion in arrest of judgment (R. 42).

On June 12, 1953, petitioner filed with the court an amended motion to set aside judgment of conviction and permit appellant to withdraw his plea of *nolo contendere* (R. 43-49).

On June 12, 1953, petitioner also filed a petition for probation (R. 50-55).

In his amended motion to withdraw his plea, petitioner stated that although innocent he entered his plea of nolo contendere because he was led to believe and did believe that under such a plea he would receive a fine and suspended sentence and be placed upon probation (R. 43). A full statement of the facts, outlining the events and describing the conferences between counsel for petitioner and the United States Attorney which led to the entry of the plea and the complete change in attitude of the United States Attorney at the time of sentence may be found at pages 33-38 of Appendix, infra.

On June 23, 1953, a hearing was held on petitioner's motion in arrest of judgment, motions to set aside the judgment of conviction and to permit petitioner to withdraw his plea of *nolo contendere* and the petition for probation (R. 73).

At the hearing of June 23, 1953, thirteen prominent citizens of Wichita, Kansas appeared, testified and recommended probation for appellant (R. 74-76).

Burt N. Morgan, a special agent of the Intelligence Unit, Bureau of Internal Revenue, also appeared, testified and was cross-examined as to the civil liabilities of appellant (R. 76-88).

At the conclusion of the hearing the District Court denied (R. 88):

Petitioner's motion in arrest of judgment;

Petitioner's motion and amended motion to set aside judgment of conviction and to permit appellant to withdraw his plea of nolo contendere; and,

Petitioner's petition for probation.

The petitioner thereupon duly filed notice of appeal to the United States Court of Appeals for the Tenth Circuit in both cases, Nos. 8751 and 8752 (R. 94-95).

On April 9, 1954 the United States Court of Appeals for the Tenth Circuit rendered an opinion affirming the decision, order and judgment of the District Court (R. 97). Judgment was entered by the Court of Appeals on April 9, 1954 (R. 102).

On June 7, 1954, certiorari was granted by this Court (R. 103).

SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the order and judgment of the District Court denying petitioner's motion to dismiss the indictments. The orderly procedure required by law was not followed by the United States Attorney in presenting these cases to the grand jury at Topeka, Kansas without the authorization or direction of the Attorney General as required by Executive Order 6166; Circular Letter No. 2431 issued by the Attorney General pursuant to said Executive Order; and Section 3740, Title 26 of the Internal Revenue Code and the United States Code.

Executive Order No. 6166 should be interpreted just as the Attorney General of the United States has himself interpreted it by Circular Letter No. 2431 in which he directed United States Attorneys to present evidence to a Grand Jury concerning violations of Internal Revenue

laws only when authorized to do so by the Attorney General's Office unless emergency calls for immediate action. The record here clearly shows that no emergency existed in this case.

The Acting Assistant Attorney General notified counsel for petitioner on January 31, 1952 that in view of the fact that the first year involved was 1946 a conference on the matter could not be held until after March 15, 1952 (R. 25-26). However, in less than one month after said notification the United States Attorney presented the evidence to a Grand Jury at Topeka, Kansas and petitioner was indicted (R. 1 and 3). The question of a violation of the Internal Revenue laws for the year 1945 was not even presented to the Attorney General for his consideration (R. 25).

The Executive Order and resulting Circular Letter had the force and effect of law in regard to supervision and procedure in all tax litigation. Executive orders as well as department regulations issued pursuant to statutory authorization have the force and effect of law of which the courts are bound to take cognizance. (See 54 Am. Jur., United States, Section 37, Proclamations and Executive Orders, Page 553, and cases cited therein, and *State ex rel. Kaser v. Leonard*, 102 Pac. 2d 197, 129 A.L.R. 1125, which outlines the Federal cases on the subject.

Petitioner also relies on Section 3740, Title 26 U.S.C. It is submitted that this section of the statute does not relate merely to civil actions, as the Court of Appeals held, but that it covers all tax litigation including prosecutions under Section 145(b) U.S.C. Petitioner finds no opinion of the Attorney General, regulation, ruling or circular letter limiting said section to civil proceedings.

The pertinent section of the statute uses the word "suit". The word "suit" is a comprehensive term which may be and is sometimes used to include criminal pro-

ceedings, such as an indictment or information; 1 Corpus Juris Secundum, page 962 and cases there cited. A criminal case has been defined as an action, suit or cause instituted to punish an "infraction of the criminal law". 1 Corpus Juris Secundum, p. 951.

Section 3740 also uses the words "for the recovery of * * * any fine, penalty, or forfeiture". Section 145(b), U.S.C., under which petitioner was indicted, is a penalty section for tax evasion providing both for fine and/or imprisonment. "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603; *United States v. La Franca*, 282 U.S. 568; *United States v. McKee*, 4 Dill 128.

We think that failure to strictly follow the provisions of Section 5, Executive Order No. 6166; Circular Letter No. 2431; and Section 3740, Title 26 U.S.C. would seriously impair the orderly administration of justice in revenue cases and subject taxpayers to the whims, caprices and prejudices of minor officers in local communities. We believe that it was the intent of Congress that the sole responsibility should rest with the Attorney General (Speech of Senator Robinson of Arkansas, Congressional Record, June 10, 1933, page 5615). (App. infra p. 38).

The decision of the Court of Appeals is not in accord with the well established principal that a defendant may be permitted to withdraw a plea of "guilty" or *nolo contendere* "to correct manifest injustices". Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.A.

There is no question in this case but that the petitioner was advised by his three attorneys (who took part in the conferences with the United States Attorney) to enter the plea of nolo contendere (R. 46, 47, 48, 57, 60, 66).

The petitioner's attorneys were in turn misled by the friendly attitude and remarks of the United States Attorney and his assistant during the conferences initiated by the United States Attorney with respect to the closing of the case by the entering of a plea of guilty or *nolo contendere* (Appendix p. 33-34 infra).

The petitioner should have been allowed to withdraw his plea because his "choice" was "beclouded" by the attitude and remarks of the United States Attorney and his assistant during conferences held and by advice given him by his own counsel who in turn relied upon the statements of the United States Attorney. *Von Moltke v. Gillies*, 332 U.S. 708, 729. The attitude of the United States Attorney completely changed at the time of sentence (R. 28-34).

The material inquiry is whether the petitioner was misled and if so he was entitled to withdraw his plea. *Bergen v. United States* (CA 8) 145 F. (2d) 181, 187.

The discretion of the courts below should have been exercised liberally. *Kercheval v. United States*, 274 U.S. 220, 224; *Bergen v. United States*, supra.

The least surprise or influence should be sufficient grounds for permitting a change of plea. *United States v. William G. Lias* (CA 4) 173 F. (2d) 685.

The determination by the petitioner Sullivan to plead *nolo contendere* involved a waiver by him of his constitutional right to a trial by jury guaranteed by Article III, Section 2 of the Constitution of the United States and by the Sixth Amendment to that Constitution. He asks only as a matter of simple justice to be permitted to withdraw the plea.

ARGUMENT

I.

The Orderly Procedure Required by Law Was Not Followed in Presenting These Cases to the Grand Jury. Therefore the Court Below Erred in Failing to Hold That the Grand Jury Proceedings Were Irregular and Unlawful. The Petitioner's Motions to Dismiss the Indictments and in Arrest of Judgment Should Have Been Granted by the District Court.

The presentation of these cases to the Grand Jury at Topeka, Kansas was not directed or authorized by the Attorney General of the United States as required by Executive Order No. 6166, Section 5, supra, (page 2 this brief, promulgated June 10, 1933, 5 U.S.C., 1946 Ed., Section 124-132) as interpreted by the Attorney General in Circular Letter No. 2431 issued by the Attorney General pursuant thereto.

Executive Order No. 6166 was promulgated by President Franklin D. Roosevelt under authority of the "Economy Act" of June 30, 1932, 47 Stat. 413 and under the Reorganization Act of March 3, 1933, c.212, Section 16, 47 Stat. 1517. The Tax Division of the Department of Justice was created pursuant to this order and Federal tax litigation was for the first time brought under the direct control and exclusive supervision of the Attorney General. (University of Virginia Law Review, Vol. 25, No. 2, Dec., 1938, pages 198 and 199; Annual Report of the Attorney General for 1934, p. 54.)

The said Executive Order, Section 5, provided in part as follows:

• • • •

> "The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of

defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

• • • •

The intent and purpose of Section 5 of the Executive Order is shown by the remarks of Senator Robinson of Arkansas, which appears in the Congressional Record for June 10, 1933, page 5615 as follows (App. infra, p. 38):

• • • •

"The fifth feature of the Executive Order has to do with claims by or against the United States. The responsibility of prosecuting and defending the suits in which the United States is a party, is governed by a multiplicity of laws which are a maze of conflicting and anomalous provisions. District Attorneys and Marshals are responsible to the Attorney General. Nevertheless, certain agencies of the Government have the right to issue binding instructions to Attorneys and Marshals regarding the prosecution of suits. The Solicitor of the Treasury, who is in point of law a subordinate of the Attorney General, has the anomalous authority of final decision in certain matters without respect to the judgment of the Attorney General. It was clearly the intent of the law creating the Department of Justice that the Attorney General should have responsibility for prosecuting and defending suits to which the United States is a party, and the whole conflict comes from failure to properly amend antecedent laws.

"The order gives effect to the legislative intent respecting the Department of Justice and centers in the Attorney General the sole responsibility for the

conduct of suits. The order in no wise diminishes the present authority of the various departments in respect to controversies before they get into the courts, but it provides that, once the Attorney General is called upon to act in the matter, thereafter his judgment is to be conclusive. This is highly desirable from the standpoint of sound organization and it will be productive, perhaps, not of saving any actual expense, but of savings due to bettering the administration of court matters."

* * * *

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

The administrative practice and procedure of the Attorney General has followed and confirmed the interpretation of Executive Order 6166, Section 5, supra, by Circular Letter No. 2431, supra.

The Annual Report of the Attorney General of the United States for the fiscal year ended June 30, 1940 at page 71 states:

"The institution and supervision of criminal prosecution of alleged violations of the internal revenue laws, other than those relating to liquor taxes, constitutes an important part of the work of the Tax Division.

* * * *

"A case which is forwarded from this Division to the United States Attorney for the institution of criminal proceedings is one which has been subjected to a painstaking scrutiny carefully designed to elimi-

nate those cases where the invoking of criminal sanctions is not warranted."

* * * *

The following steps are taken in the office of the Attorney General when a case is received from the Commissioner of Internal Revenue:

"* * * The case will then be assigned to an attorney in the Criminal Section of the Tax Division and after careful review by the Head of the Criminal Section it will be returned to the Assistant Attorney General in charge of the Tax Dvision. The final decision will be made at this point. If a recommendation is made to close out the criminal phase, the file will be returned to the Bureau with a statement of reasons why the Tax Division refused to authorize prosecution.

"However, if the Assistant Attorney General decides in favor of prosecution, the file will be sent to the proper United States Attorney in the field for the initiation of the action. The United States Attorney (or any attorney specially assigned from the Criminal Section of the Tax Division) will then present the evidence to a federal grand jury and ask for an indictment."

(The above is a quotation from an article entitled "Penalty Cases", page 207-208, Sixth Annual Institute on Federal Taxation. Please see also "Proceedings in the Department of Justice" pages 88 to 90 of Fraud under Federal Tax Law, Second Edition, 1953, by Harry Graham Balter.)

In a letter dated December 22, 1938 to the Honorable Pat Harrison, Chairman, Joint Committee on Internal Revenue Taxation, the Assistant Attorney General, Honorable James W. Morris, stated in part as follows:

* * * *

"I am glad to learn that the long realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is probably soon to be filled. This need has been

specially impressed upon the Tax Division of the Department of Justice inasmuch of the *function of the handling of revenue litigation* rests with it.

"It is evident that the confusion existing by reason of the number of revenue acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various acts, constitutes a burden to the courts and counsel alike. Furthermore, *several of these statutory provisions have been amended by Executive order*, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion." (Emphasis ours.)

* * * *

(See Senate Reports, Volume 5, 76th Congress, 1st Session, 1939, Calendar No. 19, Report No. 20 at page 5. For complete copy of the letter see Appendix, infra, p. 39.)

Report No. 20 of Senate Reports, Volume 5, 76th Congress, 1st Session, 1939, Calendar No. 19, points out that the Code as prepared "makes no changes in existing law".

It is respectfully submitted that Executive Order 6166, Section 5, supra, has not been amended or repealed.

Petitioner in this case prays that Executive Order 6166, Section 5, supra, be interpreted just as the Attorney General of the United States himself interpreted it by Circular Letter 2431, supra.

The Executive Order and resulting Circular Letter had the force and effect of law in regard to supervision and procedure in all tax litigation. Executive orders as well as department regulations issued pursuant to statutory authorization have the force of law of which the courts are bound to take cognizance and give effect. (See 54 Am. Jur., United States, Section 37, Proclamations and

Executive Orders, Page 553, and cases cited therein, and *State ex rel. Kaser v. Leonard*, 102 P. 2d 197, 129 A.L.R. 1125, which outlines the Federal cases on the subject.)

Petitioner also relies on Section 3740, Title 26, Internal Revenue Code and the United States Code, which provides:

"AUTHORIZATION TO COMMENCE SUIT

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings *and the Attorney General directs that the suit be commenced.* 53 Stat. 460." (Emphasis ours.)

Section 3740 of 26 U.S.C.A. was Section 3214 of the Revised Statutes. In the case of *Olson v. Mellon*, 4 F. Supp. 947, 950, the court stated:

> "We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of Section 3214, Rev. St. As we interpret it, it discloses a plain intent on the part of Congress to keep all cases for the collection of Internal Revenue taxes, fines, penalties, and forfeitures under the supervision of the Commissioner of Internal Revenue. It was existing law when it and Sections 3490-3494 became parts of the Revised Statutes, and cannot be held to be repealed by the amendment of Section 35, Criminal Code (5438, Rev. St.), by the Act of 1918 (18 U.S.C.A., Sec. 80), even if it be held—and it is still a mooted question—that the amendment is broad enough to include false income tax return. The sections may well exist together."

In *United States v. Tillinghast*, 55 F. 2d 279, 283, the court stated:

> "The clear intention on the part of Congress was to guard against the indiscriminate authorization of suits by subordinate officials or employees connected with the Bureau of Internal Revenue and to make sure that such authorization or approval should ema-

> nate from a responsible official, in this instance the Commissioner • • •."

Subsequent to this decision the statute (26 U.S.C.A. 3740) was amended as quoted, supra, by adding

> "and the Attorney General directs the suit to be commenced."

Act of February 10, 1939, to consolidate, codify and amend the Revenue Laws.

It is submitted that this section of the statute does not relate merely to civil actions, as the Court of Appeals held, but that it covers all tax litigation including prosecutions under Section 145(b) U.S.C. Petitioner finds no opinion of the Attorney General, regulation, ruling or circular letter limiting said section to civil proceedings.

The pertinent section of the statute uses the word "suit". The word "suit" is a comprehensive term which may be and is sometimes used to include criminal proceedings, such as an indictment or information; 1 Corpus Juris Secundum, page 962 and cases there cited. A criminal case has been defined as an action, suit or cause instituted to punish an "infraction of the criminal law". 1 Corpus Juris Secundum, p. 951.

Section 3740 also uses the words "for the recovery of • • • any fine, penalty, or forfeiture". Section 145(b) U.S.C., under which petitioner was indicted, is a penalty section for tax evasion providing both for a fine and/or imprisonment. "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603; *United States v. La Franca*, 282 U.S. 568; *United States v. McKee*, 4 Dill 128.

As was said by this Court in *Spies v. United States*, 317 U.S. 492:

• • • •

> "The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offenses enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. *Helvering v. Mitchell*, 303 U.S. 391, 82 L. ed. 917, 58 S. Ct. 630."

• • • •

Please see also *Coffey v. United States*, 116 U.S. 436 and *Stone v. United States*, 167 U.S. 178.

The Court below (R. 99) relied upon *United States ex rel. Marcus v. Hess* (CA 3), 127 F. (2d) 233. In that case the Court, in referring to Section 3740 of the Internal Revenue Code and the United States Code, said:

> "This provision is a part of the Internal Revenue Code and relates only to those qui tam actions brought under the Revenue Laws."

The Court did not hold that said Section 3740 was limited to and referred only to qui tam actions.

Moreover the action in *United States v. Hess*, supra, was not brought under Section 3740 of the Internal Revenue Code for the action did not involve a tax situation. It was brought under the Revised Statutes, Sections 3490-3493, 31 United States Code, Sections 231-234 on account of the filing of a false claim against the Government.

This Court on several grounds reversed the decision of the Third Circuit in *United States v. Hess*, supra. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443.

Accordingly the decision of the Third Circuit in *United States ex rel. Marcus v. Hess*, supra, cannot be relied

upon by respondent as an authority against the petitioner in this case.

We think that Section 3740 of the Internal Revenue Code, supra, should be read together with Section 3761, Title 26, Internal Revenue Code, also relied on by petitioner, which provides:

> "COMPROMISES—(a) AUTHORIZATION.
>
> "The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; *and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.*" (Emphasis ours.)

This section was derived from Section 3229 of the Revised Statutes, which, in turn, is a revision of Section 102 of the Acts of July 30, 1868, 15 Stat. 166.

In *Botany Worsted Mills v. United States*, 278 U.S. 282, this Court, in discussing Section 3229 of the Revised Statutes, said at page 288:

> "• • • We think Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc. R.R. Co. v. Reid, 13 Wall. 269, 270; Scott v. Ford, 52 Ore. 288, 296."

In *United States v. Beebe*, 180 U.S. 343, 351, this Court said:

> "• • • The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party, and that such an attorney has no power to compromise a claim in suit has been frequently decided. • • •"

In *United States v. Gliddon Co. et al.* (CA 6, 1941), 119 F. (2d) 235, 246, the Court said:

> "• • • Appellee's contention that the payment of the fine of $10,000 in the criminal action was in the nature of a compromise of its alleged liability in this action must be denied. Such a settlement would be invalid without the consent of the Secretary of the Treasury and the Attorney General under the provisions of the Revised Statutes, Section 3229 and the Internal Revenue Code, Section 3761, 26 U.S.C.A., Int. Rev. Code 3761. • • •"

Under Section 5, Executive Order 6166, supra; Circular Letter No. 2431, supra Section 3140, Title 26 of the Internal Revenue Code, supra; and Section 3761 of Title 26, U.S.C.A., supra, a United States Attorney has no authority without the authorization and direction of the Attorney General:

1. To present a Federal income tax case to a grand jury.

2. To institute a civil suit involving income tax cases, or

3. To compromise any civil or criminal tax case.

The only exception is that of "emergency" referred to in Circular Letter No. 2431, supra.

The record here clearly shows that no emergency existed in this case. The Acting Assistant Attorney General notified counsel for petitioner on January 31, 1952 that in view of the fact that the first year involved was

1946 a conference on the matter could not be held until after March 15, 1952 (R. 25-26). However, in less than one month after said notification the United States Attorney presented the evidence to a Grand Jury at Topeka, Kansas and petitioner was indicted (R. 1 and 3). The question of a violation of the Internal Revenue laws for the year 1945 was not even presented to the Attorney General for his consideration (R. 25-26).

Under these circumstances, there has been in this case a disregard of the law governing the procedure prior to indictment. The defendant was deprived of the independent investigation and consideration of the Attorney General's Office to which he was by law entitled. The safeguards set up for protection of citizens against the whims, caprices, and prejudices of minor officials have been violated in this case. The defendant was not accorded the fair and impartial treatment to which he was entitled under the law.

We respectfully urge, therefore, that the indictments should have been dismissed and the motion in arrest of judgment granted.

II.

The District Court Erred in Refusing to Grant Petitioner's Motion and Amended Motion to Set Aside the Judgment of Conviction and to Permit Petitioner to Withdraw His Plea of Nolo Contendere.

The decision of the Court of Appeals is not in accord with the well established principal that a defendant may be permitted to withdraw a plea of guilty or *nolo contendere* "to correct manifest injustice". Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.A., supra (App., infra p. 32).

a.

The facts upon which the motion and amended motion to withdraw the plea of nolo contendere were based.

During the evening of April 6, 1953, at the suggestion of the United States Attorney, a conference was held between counsel for petitioner and the United States Attorney and his assistant with respect to the entry of a plea of "guilty" or "*nolo contendere*" by the petiitoner (R. 58-59). At this discussion counsel for petitioner were informed by the Government officials that they (the United States Attorney and his assistant) thought that petitioner was subject to Berger's disease; that petitioner's brother had died of this disease; that petitioner's sister had had a leg amputated because of the disease; that they felt that the Court would be lenient with anyone of the character and reputation of petitioner, especially in view of this medical history; that the United States Attorney had no objection to probation or a suspended sentence and would not oppose the same; that the United States Attorney had noticed the petitioner's lovely wife and children and hated to see them subjected to the petitioner's standing trial (R. 58-59). The United States Attorney was very friendly and cooperative (R. 59).

The conferences were continued throughout the next day, April 7, 1953 (R. 59-60). The United States Attorney secured authorization from the Attorney General to accept a plea of *nolo contendere* on three counts of the indictments and to dismiss three counts (R. 26).

On May 26, 1953 at the time of sentence the United States Attorney became unfriendly, his attitude completely changed and he made an inflammatory speech to the Court discussing the civil liabilities of the petitioner; the counts of the indictment which had been dismissed (R. 28-34, incl.); and alleged unpaid gift taxes of peti-

tioner, which the United States Attorney said he thought were evaded (R. 34). He read from a dead revenue agent's report in a manner highly prejudicial to the petitioner (R. 31-33). At a later hearing on June 23, 1953 (R. 76-88), Special Agent Morgan, under cross examination admitted that the tax liabilities proposed against petitioner had been computed by the agents upon a "hybrid" method (R. 83); that he could not be definite about particular years (R. 84); that the proposed liabilities had never been determined by any adjudicating body (R. 84-85); that the agents adjustments involved questions of law that would be subject to a difference of opinion (R. 86) and that the Commissioner's office had not assessed any gift taxes against petitioner (R. 87).

In his address to the court (R. 28-34) the United States Attorney did not mention the facts which he had stressed at the conferences with petitioner's counsel with respect to the petitioner's being subject to Berger's disease; and that his brother had died with this disease and that his sister had her leg amputated on account of the disease (R. 63).

A detailed statement covering the conferences between the United States Attorney and petitioner's counsel and the change in attitude of the United States Attorney at the time of sentence may be found at pages 33-38 of Appendix, infra.

b.

Under the authority of the decided cases, the District Court erred in failing to grant petitioner's motions to withdraw his plea of nolo contendere.

The motions came before the court below under and pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which provides as follows:

"(d) *WITHDRAWAL OF PLEA OF GUILTY.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; *but to correct manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Italics supplied.)

The petitioner, although innocent, entered the pleas of *nolo contendere* because he was led to believe and did believe at the time of the entry thereof and up to the time that sentence was imposed on him that he, the said petitioner, would not be committed to serve any period of time in the Federal penitentiary or elsewhere but on the contrary that he, the said appellant, would receive a substantial fine and suspended sentence and be placed upon probation.

It is the position of the petitioner and his counsel that the motion of defendant should have been granted "to correct manifest injustice" which exists in this case.

It is urged by petitioner and his counsel that by reason of the matters called to the attention of the Court manifest injustice has been inflicted upon the appellant and that he has been deprived of his constitutional right to a trial by jury and that he has been deprived of his liberty, without due process of law in violation of the Sixth and Fifth Amendments to the Constitution of the United States; and that he, the petitioner, could have been relieved from this injustice, mistake, misapprehension and deprivation of his constitutional rights only by the court's allowance and granting of the petitioner's motion to withdraw his plea.

The fundamental question involved under this issue is:

"Was the appellant misled?"

"It is immaterial whether the misleading was intentionally or unintentionally done."

"The material inquiry is: Was the defendant misled, or under a misapprehension, at the time he entered his plea?"

State v. Hovis (1944), 353 Mo. 602, 183 S.W. 2d 147.

In *State v. Hovis*, supra, the Missouri Supreme Court observed:

"We do not mean to say that we think the prosecuting attorney intentionally misled the appellant, but we do think that he was misled. *The question before us is: was the appellant misled? It is immaterial whether the misleading was intentionally or unintentionally done. Was the defendant misled, or under a misapprehension*, at the time he entered his plea of guilty? While it may be true, as stated by the prosecuting attorney that he did not in so many words tell defendant that if he would make a confession that he would be paroled, yet we think the statements made by the prosecutor to the defendant were such as did cause him to believe that he would be paroled if he entered a plea of guilty." (Italics ours.)

In *Bergen v. United States* (C.C.A. 8, 1944), 145 F. (2d) 181, 187, the United States Court of Appeals stated:

"We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty."

Circuit Judge Riddick, speaking for the court in the *Bergen* case, noted also that:

"The court's discretion should be *exercised liberally* * * *." (Page 187) (Italics ours.)

In *Kercheval v. United States*, 274 U.S. 220, 224, 71 L. Ed. 1009, 1012, this Court observed:

> "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

The determination by the petitioner, Sullivan, to plead *nolo contendere* involved a waiver by him of his Constitutional right to a trial by jury guaranteed by Article III, Section 2 of the Constitution of the United States and by the Sixth Amendment to that Constitution. A *sine qua non* of a binding plea of guilty is that it be made voluntarily, and this must be given regard with a further requirement that it be made with full understanding of the consequences. In *Kercheval v. United States*, supra, this court further said:

> "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."

A pronouncement by Mr. Justice Frankfurter in a concurring note in *Von Moltke v. Gillies*, 332 U.S. 708, 729, is that while an accused, with the considered approval of the court, may competently and intelligently waive a right guaranteed by the Constitution—

> "There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered * * * a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences."

Likewise, in *Patton v. United States*, 281 U.S. 276, 312, 74 L. Ed. 853, 870, it is said that:

> "* * * before any waiver can become effective, the consent of government counsel and the sanction of the

court must be had, in addition to the *express and intelligent consent of the defendant.*" (Italics ours.)

The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. 14 Am. Jur., pp. 961-962.

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., expressly provides for the withdrawal of a plea of *nolo contendere. United States v. Western Chemical & Mfg. Co.*, 78 F. Supp. 983.

The pertinent authorities on the question here involved were reviewed in the case of *United States of America v. William G. Lias*, 173 F. (2d) 685, (CA 4), decided on March 8, 1949. The Court of Appeals quoted from the memorandum of the District Court Judge, permitting the defendant to withdraw his plea of guilty. As observed by the District Court Judge, "* * * The only thing that the goveranment has lost is a comparatively short time in which a trial might have been held. That trial can still be held. No one will be in a worse position in this case because of this action, unless it is defendant himself, the party at whose instance it is being taken".

The Court of Appeals further declared:

"The effect of the decisions bearing on the subject is well summarized in 14 Am. Jur., pp. 961-962 as follows:

'The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarliy be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear,

fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury.' (Italics ours.)

"The defendant swears that, as the result of what was said by the judge to his attorneys, he was led to believe that he would receive probation if he would plead guilty. The judge did not controvert the allegation that he had used the language attributed to him, but filed the memorandum from which we have quoted above holding that, in view of the situation presented, he would allow the plea of guilty to be withdrawn and defendant to stand trial. Certainly this was the proper course to be taken 'to correct manifest injustice,' if, as a result of what the judge had said, the defendant was misled into pleading guilty under the belief that he would receive probation.

"For the reasons stated, the appeal will be dismissed."

Petitioner asks only as a matter of simple justice that he be permitted to withdraw his plea.

CONCLUSION

Accordingly we respectfully submit that for the reasons set forth hereinabove the judgment of the Court below should be reversed and set aside. It is believed that petitioner is entitled to the following relief:

1. A decision by this Honorable Court that the United States District Court for the District of Kansas erred in denying petitioner's motions for a dismissal of the indictment here involved and the motion of petitioner in arrest of judgment.

2. A decision by this Honorable Court that in any event the United States District Court for the District

of Kansas erred in refusing to grant petitioner's motion to set aside the judgments herein and to withdraw his pleas of nolo contendere.

Respectfully submitted,

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APPENDIX

Rule 32 (d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides as follows:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea".

Section 145, Title 26, United States Code and Internal Revenue Code provides:

> "Sec. 145. Penalties.
>
> "(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information; for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> "(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law,

be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Statement of Facts upon which the Motion and Amended Motion to Withdraw the Plea of Nolo Contendere Were Based

The cases had been set for April 6, 1953, for the impaneling of a jury and for trial for April 14th (R. 57). On the night of April 5th, Mr. Luce arrived in the City of Wichita and was met at the station by Mr. Harley; both of them going to the Lassen Hotel where Mr. Luce had reservations. Mr. Luce and Mr. Harley were in Mr. Luce's room for only a few minutes when they received a telephone call from Mr. Davis, the United States District Attorney, inviting them down to his room, which invitation was accepted (R. 58 and 62).

On the morning of April 6th, a jury was selected, impaneled, sworn and excused to return April 14th for the trial of the cases (R. 62).

On the night of April 6th, Mr. Davis called Mr. Luce and invited him and Mr. Harley down to his room. Mr. Luce informed Mr. Davis that he and Mr. Harley were in conference with their client and witnesses and wouldn't be able to accept the invitation. Approximately forty-five minutes later, Mr. Davis again called and renewed his invitation, which was accepted (R. 62). Mr. Luce and Mr. Harley were met by Mr. Davis and Mr. Bingham, an Assistant United States District Attorney. After some conversation, Mr. Davis asked Mr. Luce and Mr. Harley why they didn't settle the cases by pleading the defendant guilty to one count of each indictment, to which Mr. Harley replied that the defendant would not plead guilty to any count because the defendant maintained and in-

sisted that he was not guilty of any fraudulent conduct (R. 58 and 63).

Mr. Bingham was of the opinion that the defendant should plead to three counts and asked if the defendant would enter a plea of *nolo contendere* to three counts of the two indictments (R. 63). During the discussion as to whether the defendant should and would enter a plea of *nolo contendere* to three counts of the indictment, Mr. Bingham informed Mr. Luce and Mr. Harley that he thought the defendant was subject to Berger's disease, that according to their information the defendant's brother had died of the disease, that his sister had to have a leg amputated because of the disease and that he was of the opinion the court would be lenient with anyone of the character and reputation of this defendant who had a medical background such as that (R. 60). Mr. Davis stated that he had nothing personal against the defendant and that he was of the opinion that the court would show leniency to a man of defendant's character and reputation (R. 59 and 63).

After more conversation of like tenor, Mr. Davis was asked by Mr. Harley if he would recommend probation or suspended sentence in the event said defendant should enter pleas of *nolo contendere* (R. 59). Mr. Davis stated that it was not the practice of the court to ask him for a recommendation but that he had no objection to probation or suspended sentence and to be assured that he would not oppose probation or suspended sentence (R. 59).

The major dispute as to what transpired in the conferences the night of April 6th and the night of April 7th is whether Mr. Davis stated that he had no objection to probation or suspended sentence and would not object to probation or suspended sentence. Mr. Luce in his affidavit states that such a statement was made (R. 63).

Mr. Jochems in his affidavit states that Mr. Davis stated that he would not oppose probation or suspended sentence (R. 57). Mr. Harley states in his affidavit that such a statement was made (R. 59). Mr. Bingham in his affidavit states that no such statement was made (R. 71). Mr. Davis in his affidavit states that he recalls making no such statement but that he did state that he "did not propose to take a position one way or the other, and hoped that the court would not ask him" (R. 70).

On the morning of April 7th a conference was had between Mr. Davis and Mr. Bingham and counsel for defendant as to whether the Department of Justice would approve the suggested settlement (R. 64). In the afternoon of the same day Mr. Luce and Mr. Jochems conferred with Mr. Davis and they went into the chambers of Judge Hill to ascertain whether His Honor would accept a plea of *nolo contendere*. While in his chambers, Judge Hill inquired about civil liabilities and stated in substance that even in cases where defendant pleaded guilty and was placed on probation he always made it plain that the plea was entered without prejudice to defendant's right to dispose of his civil liabilities (R. 56 and 65).

All of the aforesaid facts were related to the defendant and after lengthy discussion, at approximately 12 o'clock midnight, the defendant reluctantly agreed to enter a plea of *nolo contendere* to the three counts after being advised by counsel that they were satisfied in their own minds that both Mr. Davis and Mr. Bingham were sincere in everything they had said and that they felt from their conversations that Mr. Davis and Mr. Bingham actually favored said defendant receiving probation or suspended sentence (R. 60).

The following day, April 8th, the defendant entered pleas of *nolo contendere* to Count One and Count Three

in Case No. 8751 and upon motion of the Government Counts Two and Four were dismissed. Defendant also entered a plea of *nolo contendere* to Count One of Case No. 8752 and upon motion of the Government Count Two was dismissed. The cases were then passed for pre-sentence investigation.

On the 26th day of May, 1953, the cases came on to be heard for sentencing of the defendant, at which time Mr. Davis was asked by the court if he desired to make a statement, to which Mr. Davis replied that, perhaps, he should (R. 28).

Mr. Davis got up to make his statement and his former friendly attitude toward the defendant changed from one of friendliness and consideration to one of vindictiveness which is hard to observe from the printed word.

In Mr. Davis' statement to the court (R. 28 to 34, incl.) he not only discussed the counts to which a plea had been entered but he went into detail as to the counts which had been dismissed by the Government (R. 29).

In addition to discussing the counts of the indictments which had been dismissed, Mr. Davis went into detail relative to the claimed civil liabilities of the defendant for the years 1941 to 1948 inclusive. For the year 1948, which is Count Four of the indictment in Case No. 8751 and which had been dismissed by the Government, Mr. Davis stated the income of the defendant for that year to be $138,000.00 (R. 30). Said count alleges the actual income of the defendant to be $82,027.15 (R. 3). The amount of $138,000.00 is the amount claimed by the Government as defendant's civil tax liability and is far in excess of the amount claimed by the Government in the criminal case. In Mr. Davis' statement for said year he not only discussed an amount in excess of the amount stated in the indictment but he discussed at some length

the fact that such a large amount of income had not been reported for said year (R. 30).

Mr. Davis stated the corporate deficiency to be $57,679.29 (R. 33-34) whereas the deficiency claimed in both counts of the indictment, one of which had been dismissed, was $5,578.07 (R. 3-4). He also stated the personal deficiency of the defendant to be $186,899.62 (R. 33) when as a matter of fact all of the counts in Case No. 8751, two of which had been dismissed, only show a claimed deficiency of $52,949.20 (R. 1-3). In addition to claimed deficiencies for income taxes, Mr. Davis stated the defendant owed $17,422.51 in gift taxes (R. 34). There had never been any indication or claim that the defendant owed any gift taxes nor were they involved in the present action.

Mr. Davis further informed the court that, according to the Agent's report, it was a "painstaking, teeth-pulling, type of endeavor" to obtain the facts (R. 31). That the defendant obtained "skim-offs" from the Civic (R. 31) and Central Theatres (R. 31). He stressed the various bank accounts of the defendant (R. 33).

At the time of making his statement to the court, Mr. Davis was reading from the report of the Agent, Mr. Walker, who was then dead (R. 33). At the time of Agent Walker's death he was no longer with the Bureau and was charged with kidnapping and robbery in the District Court of Sedgwick County, Kansas.

Mr. Davis in his statement used the amounts claimed to be owed by the defendant in the audit made by the Special Agent's Office for the years 1941 to 1948, inclusive (R. 80). The amounts of these claimed civil liabilities were unknown to the defendant at this time (R. 35) and as stated by Mr. Morgan in his cross-examination it is not the policy of the Bureau to inform the defendant of his civil liabilities when there is a possibility of criminal action being brought (R. 87).

Mr. Davis stated that "* * * the Government feels that it has figures to establish that there was unreported income of the terrific total of $319,000.00 and a deficiency in tax for those particular years of $186,000.00" (R. 30). These figures and amounts were even questionable in the mind of the Special Agent, Mr. Morgan. Mr. Morgan in his cross-examination by Mr. Luce stated that their figures for the years 1941 to 1945, inclusive, were not computed on the net worth basis and asked Mr. Luce to define net worth; that the figures computed for said years were on a hybrid system (R. 83). Mr. Morgan further testified that for the year 1948 the report does not recognize the sale of the Enid properties as capital gain; that there might be a difference of opinion in determining net worth adjustment and questions of law (R. 86). Mr. Morgan also testified that the defendant had not been notified as to any gift tax liability (R. 87).

It is perfectly true that Mr. Davis did not in so many words recommend to Judge Hill any sentence that the defendant should receive but in his statement to the court he said everything that he could possibly say to prejudice the court against this defendant. (R. 28-34).

The sentence of the Court followed (R. 39). Thereafter the petitioner filed his motions to withdraw the plea.

Speech of Sen. Robinson, of Arkansas, in the Congressional Record for June 10, 1933, on Page 5615:

* * * *

"The fifth feature of the Executive Order has to do with claims by or against the United States. The responsibility of prosecuting and defending the suits in which the United States is a party, is governed by a multiplicity of laws which are a maze of conflicting and anomalous provisions. District Attorneys

and Marshalls are responsible to the Attorney General. Nevertheless, certain agencies of the Government have the right to issue binding instructions to Attorneys and Marshals regarding the prosecution of suits. The Solicitor of the Treasury, who is in point of law a subordinate of the Attorney General, has the anomalous authority of final decision in certain matters without respect to the judgment of the Attorney General. It was clearly the intent of the law creating the Department of Justice that the Attorney General should have responsibility for prosecuting and defending suits to which the United States is a party, and the whole conflict comes from failure to properly amend antecedent laws.

"The order gives effect to the legislative intent respecting the Department of Justice and centers in the Attorney General the sole responsibility for the conduct of suits. The order in no wise diminishes the present authority of the various departments in respect to controversies before they get into the courts, but it provides that, once the Attorney General is called upon to act in the matter, thereafter his judgment is to be conclusive. This is highly desirable from the standpoint of sound organization and it will be productive, perhaps not of saving any actual expense, but of savings due to bettering the administration of court matters."

DEPARTMENT OF JUSTICE
WASHINGTON

December 22, 1938

Hon. Pat Harrison,
Chairman, Joint Committee on
Internal Revenue Taxation,
Senate Office Building,
Washington, D. C.

My dear Senator Harrison:

In a recent conversation with Mr. Stam, chief of the staff of the joint committee, I was advised of the prog-

ress of the proposed codification of the revenue laws which has been undertaken by the committee.

I am glad to learn that the long realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is probably soon to be filled. This need has been specially impressed upon the Tax Division of the Department of Justice inasmuch of the function of the handling of revenue litigation rests with it.

It is evident that the confusion existing by reason of the number of revenue acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various acts, constitutes a burden to the courts and counsel alike. Furthermore, several of these statutory provisions have been amended by Executive order, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion.

I am confident that the enactment of the codification will be a definite step towards obtaining clarity, certainty, and simplicity in our revenue laws and will be of substantial aid to this division in the handling of revenue litigation.

The staff of the joint committee deserves to be commended for its valuable contribution to the tax law.

Very truly yours,

JAMES W. MORRIS
Assistant Attorney General.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes, executive orders, and rules involved	2
Statement	4
Argument	8
Conclusion	15

CITATIONS

Cases:

Bergen v. *United States*, 145 F. 2d 181	13
Blair v. *United States*, 250 U. S. 273	10
Chase, Re Charge, 30 Fed. Case No. 18,248	10
Frisbie v. *United States*, 157 U. S. 160	10
Hale v. *Henkel*, 201 U. S. 43	9
Kercheval v. *United States*, 274 U. S. 220	13
Miller, In re, 17 Fed. Cas. No. 9552	9
Ridgeway v. *United States*, 205 F. 2d 680	14
United States v. *Hess*, 127 F. 2d 233	10
United States v. *Lias*, 173 F. 2d 685	14
United States v. *One 1941 Cadillac Sedan*, 145 F. 2d 296	11
United States v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301	10
United States v. *Shneer*, 194 F. 2d 598	14
United States v. *Thompson*, 251 U. S. 408	9
Von Moltke v. *Gillies*, 332 U. S. 708	13
Williams v. *United States*, 192 F. 2d 39	14

301278—54

Statute:

Internal Revenue Code: Page

Sec. 145 (26 U. S. C. 1946 ed., Sec. 145)---- 2

Sec. 3740 (26 U. S. C. 1946 ed., Sec. 3740)-- 3, 10

Miscellaneous:

Circular Letter 2431---------- 9, 11

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 1946 ed., Secs. 124–132), Sec. 5---------- 3, 10

Federal Rules of Criminal Procedure, Rule 32- 4, 12, 14

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 747

ODOM FARRELL SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 101–106) is not yet officially reported. The District Court's findings of fact and its order denying petitioner's motion to be allowed to withdraw his plea of *nolo contendere* (R. 89–93) are not reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 9, 1954 (R. 106–107). The petition for a writ of certiorari was filed May 6, 1954. The jurisdiction of this Court is invoked

under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the indictments, though properly returned by a duly constituted grand jury, were subject to dismissal because presentation of the cases had not been specifically authorized by the Attorney General.

2. Whether the District Court erred in refusing to grant petitioner's motion to set aside the judgment of conviction and to permit him to withdraw his plea of *nolo contendere*.

STATUTES, EXECUTIVE ORDERS, AND RULES INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years,

or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced.

(26 U. S. C. 1946 ed., Sec. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 1946 ed., Secs. 124–132):

SEC. 5. The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

RULE 32. SENTENCE AND JUDGMENT:

* * * * *

(d) *Withdrawal of Plea of Guilty.*—A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

STATEMENT

On January 31, 1952, a letter (R. 25–26) was written by a Department of Justice official, acting for the Attorney General, to Mr. Lewellyn Luce, counsel for petitioner, advising that the case of O. F. Sullivan had been received in the Justice Department with the recommendation that criminal proceedings be instituted for income tax evasion for the years 1946, 1947, and 1948. Mr.

Luce had previously written requesting a conference in the event the case was transmitted from the Bureau of Internal Revenue to the Justice Department. The letter of January 31 acknowledged this request and stated that a conference date would be proposed after March 15.

While the case was being considered by the Justice Department, a duly constituted grand jury for the District of Kansas returned two indictments against petitioner on February 28, 1952. (R. 1–4.) The first count in indictment No. 8751 charged that petitioner wilfully attempted to defeat and evade a large part of his individual income tax for the calendar year 1945 by filing a false and fradulent income tax return. (R. 1.) Counts two, three and four charged like offenses for the years 1946, 1947 and 1948. (R. 2–3.) Count one in No. 8752 charged that petitioner was the president of Central Theater Company, Inc., a corporation, and that he wilfully attempted to defeat and evade a large part of the income taxes due and owing by the corporation for the calendar year 1945 by filing a false and fraudulent tax return, wherein he understated the net income of the corporation for the year 1945 and the amount of income tax due thereon. (R. 3–4.) Count two charged a like offense involving the year 1946. (R. 4.) On September 8, 1952, petitioner entered a plea of not guilty to the six counts of the two indictments. (R. 4.)

On January 12, 1953, petitioner filed motions to dismiss the indictments on the grounds that evidence concerning the violations was not presented to the grand jury pursuant to the direction of the Attorney General. (R. 23–24.) The Government presented an affidavit (R. 24–25) by Charles S. Lyon, Assistant Attorney General, Tax Division, Department of Justice, dated January 19, 1953, wherein it was stated that a conference in the Justice Department is granted as a matter of grace, not as a matter of right, that no statute requires that cases be referred to the Justice Department in Washington prior to institution of criminal proceedings, and that in some instances cases are referred directly to the United States Attorney without prior review in the Tax Division, Department of Justice. The court denied the motions to dismiss. (R. 91.) The cases were consolidated and set for trial April 6, 1953, at which time a jury was empaneled. (R. 26, 91.)

On April 8, 1953, petitioner appeared with counsel, moved to withdraw the pleas of not guilty as to counts one and three of No. 8751 and count one of No. 8752, and tendered pleas of *nolo contendere* to these counts. (R. 26.) United States Attorney Davis advised the court that he did not oppose such pleas and stated that he had authority from the Justice Department in Washington to make no objection. (R. 26.) The court accepted the pleas. (R. 26–27.)

On motion of the Government, the remaining counts were dismissed. (R. 27.)

When petitioner appeared for imposition of sentence on May 26, 1953, counsel for the Government stated the facts of the case. (R. 28–34.) Following this, counsel for petitioner made a statement in an effort to mitigate the effect of Government counsel's remarks, and strongly urged probation. (R. 34–39.) Following these statements and a brief remark by petitioner himself (R. 40), the court imposed a sentence of three years' imprisonment and a fine of $13,000. (R. 40.)

On May 29, 1953, petitioner filed a motion in arrest of judgment (R. 43) based on the same grounds as the motion to dismiss, and a motion to set aside the judgment of conviction and to permit him to withdraw his plea of *nolo contendere*. (R. 43–44.) On June 12, 1953, an amended motion to permit the withdrawal of the plea and a petition for probation were filed. (R. 44–57.) On June 23 and 25, 1953, hearings on the above motion were had at which time three attorneys representing petitioner filed affidavits in support of the motions. (R. 57–68.)

In substance, the affidavits recounted statements allegedly made by the United States Attorney and his assistant at meetings on April 5, 6 and 7, which statements were alleged to be solely responsible for the entrance of the plea of *nolo*

contendere. The affidavits charge that when the United States Attorney was asked what his recommendations would be regarding sentence, he answered that it was not the court's practice to request his opinion, but that he would have no objection to probation or a suspended sentence. (R. 58, 60–61, 65.) Mr. Harley, in his affidavit, however, stated that Mr. Luce and Mr. Jochems informed him that they were unable to obtain a definite commitment from Mr. Davis that he would recommend probation or a suspended sentence. (R. 62.) In answering affidavits (R. 68–75), the United States Attorney and his assistant denied that they had ever expressed the view that the court would be lenient or would grant probation (R. 70, 73), and stated that they had carefully avoided any commitments (R. 71, 75.) The United States Attorney stated that the suggestion of a *nolo contendere* plea had come originally from defense counsel. (R. 69.) The District Court found as a fact that no commitments had been made by the prosecution and denied the motions. (R. 92–93.)

The Court of Appeals affirmed the conviction. (R. 101–107.)

ARGUMENT

1. Petitioner contends (Pet. 10–12) that the indictments returned by a duly constituted grand jury in the District of Kansas are void because the United States Attorney presented certain facts

and evidence to the grand jury without receiving specific direction from the Attorney General to do so. This, petitioner urges, was not in compliance with Section 3740 of the Internal Revenue Code, Executive Order 6166 (*supra,* pp. 3–4), or Circular Letter 2431, dated August 10, 1933. (R. 105.)

Petitioner does not question the propriety of the organization, composition, proceedings or deliberations of the grand jury. He relied entirely in support of his motion to dismiss on the fact that the United States Attorney had not been specifically directed by the Attorney General on February 28, 1952, or previously, to present the criminal aspects of the case to the grand jury. No claim was made that the Constitution or any statute prohibited the grand jury from taking the action they did. Unless the grand jury's power was restricted by the Executive Order, Circular Letter, or Section 3740, the indictments were entirely legal and sufficient. It is undisputed that a Federal grand jury has plenary power to investigate in all criminal matters within the jurisdiction and render indictments either at the instance of the court, the United States Attorney, the Attorney General, or on its own initiative from evidence it may gather or from knowledge of its members. See *Hale* v. *Henkel,* 201 U. S. 43, 63–66; *United States* v. *Thompson,* 251 U. S. 408, 413–414; *In re Miller,*

17 Fed. Cas. No. 9552; *Blair* v. *United States,* 250 U. S. 273; *United States* v. *Philadelphia & R. Ry. Co.,* 225 Fed. 301 (E. D. Pa.); *Frisbie* v. *United States,* 157 U. S. 160, 163. See *Re Charge, Chase,* 30 Fed. Cas. No. 18,248:

> You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. * * *
>
> In respect to the mode and extent of your inquiries, your own good sense will be your best guide.

Section 3740 of the Internal Revenue Code, on which petitioner relies, relates only to civil proceedings. In *United States* v. *Hess,* 127 F. 2d 233, 238 (C. A. 3d), the court said: "This provision [Sec. 3740] is a part of the Internal Revenue Code and relates only to those *qui tam* actions brought under the revenue laws."

Petitioner's view of Section 5 of Executive Order 6166 apparently is that no grand jury could return an indictment for the violation of internal revenue laws without the approval of the Justice Department and without receiving specific authorization therefrom. An examination of that order clearly indicates that it simply had the effect of transferring the handling of

all claims and demands by, and offenses against, the United States to the Department of Justice from all other agencies. Nothing in the order indicates that the power of a grand jury to indict is in any way limited nor are any restrictions placed on the right of the United States Attorney to present evidence.[1]

In view of the clear import of the Executive Order, any restriction upon the initiative of the United States Attorneys, as claimed by petitioner, derived from Circular Letter 2431. A circular letter is not an official regulation and does not have the force and effect of law. The Attorney General might have directed the United States Attorney to seek dismissal of the indictments upon learning of them, but he chose not to do so. There is language in the letter authorizing the United States Attorney to present a case to the grand jury when "an emergency call[s] for immediate action." Petitioner made no showing that such emergency did not exist here, and it may be assumed that the Attorney General was satisfied with the action of his subordinate, since he took no steps to have the indictment set aside. Furthermore, the circular letter was merely intended to control the internal functioning of the Department of Justice and was obviously not intended to confer rights upon defendants.

---

[1] The United States Attorney is an integral part of the Justice Department. See *United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C. A. 7th).

2. Petitioner contends (Pet. 12–15) that the trial court erred in refusing to allow him to withdraw his plea of *nolo contendere* and in denying the motion to set aside the judgment of conviction. The request for relief was made under Rule 32 (d) of the Federal Rules of Criminal Procedure (*supra*, p. 4). Under this rule, it will be noted, no motion to withdraw a plea of *nolo contendere* may be made after sentence is imposed, except that the court may grant such a motion to correct a "manifest injustice." Petitioner, therefore, was required to demonstrate manifest injustice since, in this case, imposition of sentence preceded the motion to withdraw the plea. (R. 40, 43–44.)

In support of his motion that the court allow the plea to be withdrawn to avoid manifest injustice, petitioner claimed that the United States Attorney and his assistant made statements to petitioner's lawyers which led them to believe that petitioner would be placed on probation or given a suspended sentence if he were to plead *nolo contendere*. (R. 43–50.) It should be noted that petitioner apparently does not claim that the United States Attorney promised even to recommend such leniency. Rather, this specific claim is that the United States Attorney promised petitioner's lawyers that he would not oppose probation or a suspended sentence. (Pet. 12, 19.) However, the district court found "that no

promise of probation or lenience was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government." (R. 92–93.) The Court of Appeals, after holding that his finding was supported by the evidence, further concluded as follows (R. 106):

> Even if it be assumed that the United States Attorney promised that he would not oppose an application for probation, there is nothing in this record to indicate that he did actively oppose probation. He was under a duty to present the relevant facts with respect to the offenses charged to the court. Those facts may have indicated that probation was not appropriate, but that cannot in any sense be construed to be a violation of his alleged promise not to oppose probation.

Petitioner relies on several cases,[2] none of which is applicable here. The courts have held

[2] *Bergen* v. *United States*, 145 F. 2d 181, 187 (C. A. 8th), and *Von Moltke* v. *Gillies*, 332 U. S. 708, are not in point since in those cases defendants were not represented by counsel and were not familiar with the nature and extent of the charges against them, circumstances not present in this case where petitioner was adequately represented. *Kercheval* v. *United States*, 274 U. S. 220, is not in point since there the Court had allowed the defendant to withdraw his plea and

without exception that no basis exists for setting aside a plea of *nolo contendere* simply because the defendant was surprised at the severity of the sentence. *Williams* v. *United States,* 192 F. 2d 39 (C. A. 5th); *Ridgeway* v. *United States,* 205 F. 2d 680 (C. A. 6th); *United States* v. *Shneer,* 194 F. 2d 598 (C. A. 3d).

At the hearing before sentence (R. 27–40), petitioner had an opportunity to reply to the Government's explanation of the case and did so reply. There was still time under Rule 32 (d) for petitioner to seek to withdraw the *nolo contendere* plea, as sentence had not yet been imposed. It would appear that petitioner did not then consider that the United States Attorney's statement was so unfair as to require him to withdraw his plea. Instead, he took his chances on clemency. Under the circumstances, the Court of Appeals correctly concluded that the trial court was within its discretion in refusing to grant the belated motion for leave to withdraw the plea.

---

the only question was the right of the prosecution to use the plea as evidence in the trial that followed. In *United States* v. *Lias,* 173 F. 2d 685 (C. A. 4th), the plea was permitted to be withdrawn because defendant was misled by statements made by the court leading him to believe he would be placed on probation. In the instant case the trial judge specifically found that no such statements were made. (R. 92.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
DAVID R. URDAN,
Special Assistants to the Attorney General.

JUNE 1954.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, Executive Orders and Rules	2
Statement	4
Summary of argument	12
Argument:	
I. The indictments were returned by a duly constituted grand jury and are valid; they were not subject to dismissal because presentation of the cases to the grand jury had not previously been specifically authorized by the Attorney General	16
II. The District Court did not abuse its discretion when it denied petitioner's motion to set aside the judgments of conviction and to permit him to withdraw his pleas of *nolo contendere*	26
Conclusion	39
Appendix	40

CITATIONS

Cases:

Bergen v. *United States*, 145 F. 2d 181	28, 36
Blair v. *United States*, 250 U.S. 273	17
Charge to Grand Jury, Re, 30 Fed. Cas. No. 18,248	17
Cobbledick v. *United States*, 309 U.S. 323	17
Cone v. *West Virginia Paper Co.*, 330 U.S. 212	35
Friedman v. *United States*, 200 F. 2d 690, certiorari denied, 345 U.S. 926	27
Frisbie v. *United States*, 157 U.S. 160	17
Futterman v. *United States*, 202 F. 2d 185	27
Hale v. *Henkel*, 201 U.S. 43	17
Hart Coal Corp. v. *Sparks*, 9 F. Supp. 825	23
Helvering v. *Mitchell*, 303 U.S. 391	25
Hepner v. *United States*, 213 U.S. 103	25
Hudson v. *United States*, 272 U.S. 451	27
Kercheval v. *United States*, 274 U.S. 220	37
Miller, In re, 17 Fed. Cas. No. 9552	17

Cases—Continued

	Page
Ridgeway v. *United States*, 205 F. 2d 680	34
Stidham v. *United States*, 170 F. 2d 294	34
Stockwell v. *United States*, 13 Wall. 531	25
United States v. *Colonna*, 142 F. 2d 210	28
United States v. *Evan Raymond Dale*, Crim. No. 18118, E.D. Ill. (opinion dated May 1, 1954) (unreported)	18
United States v. *Dotterweich*, 320 U.S. 277	14, 24
United States v. *Fox*, 130 F. 2d 56, certiorari denied, 317 U.S. 666	27
United States v. *Lias*, 173 F. 2d 685	36
United States v. *Morgan*, 222 U.S. 274	14, 23
United States v. *One 1941 Cadillac Sedan*, 145 F. 2d 296	14, 22
United States v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301	17
United States v. *Safeway Stores*, 140 F. 2d 834	25
United States v. *Fred M. Saigh, Jr.*, No. 27136(3), E. D. Mo. (Eastern Division) (order dated Aug. 20, 1952) (unreported)	18
United States v. *Shneer*, 194 F. 2d 598	27, 29, 34
United States v. *Smyth*, 104 F. Supp. 283	17
United States v. *Thompson*, 251 U.S. 408	17
United States ex rel. Marcus v. *Hess*, 127 F. 2d 233, reversed, 317 U.S. 537	24
Von Moltke v. *Gillies*, 332 U.S. 708	36
Williams v. *United States*, 192 F. 2d 39	27

United States Constitution and Statutes:

Constitution of the United States:	
Fifth Amendment	17
Act of March 3, 1933, c. 212, Sec. 16, 47 Stat. 1517-18	18
Internal Revenue Code of 1939:	
Sec. 145 (26 U.S.C. Sec. 145)	2
Sec. 3740 (26 U.S.C. Sec. 3740)	3, 14, 24, 25
Sec. 3741 (26 U.S.C. 1946 ed. 3741)	25
Sec. 3748 (26 U.S.C. Sec. 3748)	22, 25
Internal Revenue Code of 1954, Sec. 7401	25
28 U.S.C. Sec. 507	20, 22

Miscellaneous:

	Page
Black, *Law Dictionary*, 4th ed. 1951, p. 1603	25
Circular Letter No. 2431, dated August 10, 1933,	13, 18, 20, 21, 40
Executive Order No. 6166 (5 U.S.C. Secs. 124-132), Sec. 5	3, 13, 17, 18, 19, 22
Federal Rules of Criminal Procedure, Rule 32,	4, 14, 26, 27, 36, 37, 38
H. Rep. No. 1337, 83d Cong., 2d Sess., p. A430	26
S. Rep. No. 1622, 83d Cong., 2d Sess., p. 609	26

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 64

ODOM FARRELL SULLIVAN, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 97-101) is reported at 212 F. 2d 125. The order of the District Court denying petitioner's motions and its findings of fact in support thereof (R. 89-92) are not reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 9, 1954 (R. 102-103). The petition for a writ of certiorari was filed on May 6, 1954

and was granted on June 7, 1954. (R. 103). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the indictments, though properly returned by a duly constituted grand jury, were invalid because presentation of the cases to the grand jury had not previously been specifically authorized by the Attorney General.

2. Whether the District Court erred in refusing to grant petitioner's motion to set aside the judgments of conviction and to permit him to withdraw his pleas of *nolo contendere*.

STATUTES, EXECUTIVE ORDERS AND RULES

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

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No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced.
(26 U. S. C. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 124-132):

Section 5.—*Claims by or against the United States.*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon pros-

cution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

Rule 32. SENTENCE AND JUDGMENT

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On February 28, 1952, a duly constituted grand jury for the District of Kansas returned two indictments against petitioner (R. 1-4). The first count in indictment No. 8751 charged that peti-

tioner wilfully attempted to defeat and evade a large part of his individual income tax for the calendar year 1945 by filing a false and fraudulent income tax return (R. 1-2). Counts two, three and four charged like offenses for the years 1946, 1947 and 1948 (R. 2-3). Count one in No. 8752 charged that petitioner was the president of Central Theater Company, Inc., a corporation, and that he wilfully attempted to defeat and evade a large part of the income taxes due and owing by the corporation for the calendar year 1945 by filing a false and fraudulent tax return, wherein he understated the net income of the corporation for the year 1945 and the amount of income tax due thereon (R. 3-4). Count two charged a like offense involving the year 1946 (R. 4).

On September 8, 1952, petitioner, represented by his counsel, Messrs. Luce and Maloney of Washington, D. C., and Mr. Harley of Kansas, entered a plea of not guilty to the six counts of the two indictments (R. 5, 89-90).

On January 12, 1953, petitioner filed motions to dismiss the indictments on the ground that evidence concerning the violations had not been presented to the grand jury by the United States Attorney pursuant to the direction of the Attorney General (R. 23-24). Petitioner filed, as an exhibit to these motions, a letter dated January 31, 1952, written by a Department of Justice official to Mr. Luce, of counsel for petitioner, advising him that petitioner's case had been referred to the Department of Justice with the recommen-

dation that criminal proceedings be instituted against him for individual income tax evasion for the years 1946-1948, inclusive, and for evasion of corporate income tax for the year 1946, and stating that a conference date, as previously requested by Mr. Luce, would be proposed soon after March 15, 1952 (R. 25-26). The United States Attorney filed an answering affidavit by Charles S. Lyon, then Assistant Attorney General, Tax Division, Department of Justice, dated January 19, 1953, stating that a conference in the Justice Department is granted as a matter of grace, not as a matter of right, that no statute requires that cases be referred to the Justice Department in Washington prior to institution of criminal proceedings, and that in some instances cases are referred by the Bureau of Internal Revenue directly to the United States Attorney without prior review in the Tax Division, Department of Justice (R. 24-25).

Petitioner's motions to dismiss were argued at length on January 21, 1953, and taken under submission by the court with briefs on behalf of both parties being filed. At this hearing petitioner was represented by Mr. Luce of Washington, D. C., and Messrs. Harley and Jochems of Kansas (R. 90), the three counsel who represented petitioner throughout the proceedings in the courts below. The court denied the motions to dismiss (R. 90). The cases were later consolidated and set for trial April 6, 1953 (R. 26, 90).

On April 6, 1953, petitioner and his three counsel being personally present, a jury was empaneled and sworn (R. 90). Thereafter and prior to the entry

of petitioner's pleas of *nolo contendere* a number of meetings between counsel for petitioner and the United States Attorney took place at which the pleas to be entered by petitioner were discussed. The details of these meetings are set forth in affidavits subsequently filed in support of and in opposition to petitioner's motion to set aside the judgment of conviction (R. 56-73). At the hearing on the motion the United States Attorney observed that there was not much difference in the recollections of the various participants as to what occurred (R. 76).

The first meeting at which the pleas to be entered by petitioner were discussed took place the evening of April 6, 1953, at the invitation of the United States Attorney (R. 67). All of the meetings the following day were at the initiative of petitioner's counsel (R. 64-65). When it appeared that petitioner would not plead guilty to any of the counts because of its possible effect on his civil cases (R. 67), someone[1] suggested *nolo contendere* and further discussion centered on whether such a plea would be acceptable to the Department of Justice and the Court (R. 67-69, 63-65). The question whether petitioner had a good case for probation was also discussed and the relevant factors explored (R. 68-69, 63). Petitioner's counsel asked the United States Attorney if he would recommend probation (R. 67-68, 69). The United States Attorney replied that it was not the practice of the court to

[1] The United States Attorney states that *nolo contendere* was suggested by Mr. Luce (R. 67). Mr. Luce states that the plea was first suggested by Mr. Bingham, the United States Attorney's assistant (R. 63).

ask for a recommendation (R. 68, 59). This was duly reported to petitioner (R. 45, 64).

The next day, April 7, 1953, counsel for petitioner called on the United States Attorney three times (R. 64-65). In the afternoon the United States Attorney informed petitioner's counsel that he had obtained oral approval from the Department of Justice of a settlement involving pleas of *nolo contendere* to certain of the counts and dismissal of the remaining counts (R. 64). Messrs. Luce and Jochems for petitioner and the United States Attorney then went before the court in chambers to ascertain whether the court would accept a plea of *nolo contendere*. While in chambers the court inquired as to the civil liabilities of petitioner and was informed that civil liabilities were outstanding. (R. 64). The court remarked that in cases where the defendant pleaded guilty and was placed on probation, such plea was entered without prejudice to defendant's rights to dispose of his civil liabilities (R. 65).

There were further discussions among counsel that night. The United States Attorney reiterated that he would not be in a position to recommend probation (R. 69) and petitioner was informed that his counsel had been "unable to obtain a commitment" from the United States Attorney "that he would make a recommendation of probation or suspended sentence" (R. 60). The United States Attorney recalls making no statement that he would not oppose probation (R. 70), and this is confirmed by his assistant (R. 71). Counsel for petitioner state that the United States Attorney

said he would not oppose probation (R. 63). The court found that "no promise of probation or leniency was made" (R. 92).

Petitioner was fully advised by his counsel of all discussions with the United States Attorney (R. 57, 60, 64, 66), and reached his decision to plead *nolo contendere* after "considerable discussion and consideration" (R. 47).

The next day, April 8, 1953, petitioner appeared with his three counsel and moved to withdraw his plea of not guilty to counts one and two of indictment No. 8751 and count one of indictment No. 8752 and tendered pleas of *nolo contendere* to these counts (R. 26-27). The United States Attorney recommended acceptance of the pleas and stated that he had authority from the Department of Justice in Washington to do so (R. 26). Thereupon, the court accepted the pleas and on motion of the Government, the remaining counts were dismissed (R. 27). The court deferred sentence so that a complete pre-sentence report by the probation office could be prepared, and set the sentencing hearing for May 5, 1953 (R. 27), which was later continued at the request of the petitioner to May 26, 1953 (R. 91).

At the sentencing hearing, on May 26, 1953, petitioner appeared with Messrs. Luce and Jochems (R. 34, 35). The United States Attorney was invited by the court to make a statement about the case (R. 28, 91). The United States Attorney reviewed in detail the charges in the two counts in indictment No. 8751 which were before the court for sentencing (R. 28). After noting that the re-

maining counts had been dismissed, he stated the amount of tax evaded as charged in each such count (R. 28). He then reviewed in detail the charges in count one of indictment No. 8752 which was before the court for sentencing and stated, as to count two, only that it had been dismissed (R. 28-29).

The United States Attorney then stated that he felt he owed "a duty to the court to give the background of the investigation somewhat of Mr. Sullivan and his history taxwise" (R. 29). In the course of this further statement he discussed petitioner's civil tax liabilities as claimed by the Government and reviewed some of the difficulties the Government had had in dealing with petitioner in the course of its investigation of his tax returns. In closing he summarized the Government's claims as to civil liabilities, noting that these amounts were not involved in the criminal case. (R. 29-34.) The United States Attorney made no statement with respect to the sentence to be imposed or probation (see R. 28-34).

The United States Attorney was followed by petitioner's counsel, Mr. Luce of Washington, D. C., who stressed, among other things, that the civil liabilities which had been mentioned were not before the court and that their amount was in dispute and would have to be settled by the Tax Court of the United States (R. 34-35). Mr. Jochems, also of counsel for petitioner, suggested that petitioner's difficulties stemmed from his being too busy on bigger things and that there was no actual fraud. He discussed the civic record of

petitioner and asked that petitioner be placed on probation for whatever sentence the court imposed, mentioning in this connection that his health was not good. (R. 35-39.) Petitioner then himself made a brief statement beseeching clemency (R. 39).

Following these statements, the court imposed sentences totalling three years imprisonment and fines of $13,000 and denied petitioner's application for probation (R. 39-40).

On May 29, 1953, petitioner filed a motion in arrest of judgment based on the same grounds as his earlier motion to dismiss the indictments (R. 42) and a motion to set aside the judgment of conviction and permit the withdrawal of his plea of *nolo contendere* (R. 42-43). On June 12, 1953, an amended motion to permit withdrawal of the plea (R. 43-49) and a petition for probation (R. 50-55) were filed.

On June 23, 1953 hearings were held on petitioner's motions. Petitioner's three counsel each addressed the court on various of the matters involved. (R. 73-74.) Affidavits of petitioner's counsel reviewing discussions between counsel for petitioner and counsel for the Government immediately prior to entry of petitioner's pleas of *nolo contendere* (R. 56-66) were offered and received in evidence (R. 74). The court heard testimony of twelve character witnesses in support of petitioner's petition for probation (R. 74-76). Thereafter the United States Attorney and his assistant argued for the Government and filed (R. 76) affidavits containing their recollection of the events of

April 5-7, 1953 (R. 66-73). At the conclusion of the hearings the court denied petitioner's motions (R. 88). With his order the court filed detailed findings of fact (R. 89-92) which included the following (R. 91-92):

> 9. At the June 23 hearing, the court specifically inquired of defendant's counsel as to whether any remark or statement made by the court to defendant's counsel had influenced them in advising the defendant to enter the pleas above mentioned. The court was assured by defendant's counsel and now finds that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of nolo contendere.
>
> 10. The court further finds that no promise of probation or lenience was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government.

The Court of Appeals for the Tenth Circuit affirmed the conviction, finding nothing in the record that vitiated the two indictments or indicated that the trial court had abused its discretion in denying petitioner's motion for leave to withdraw his plea of *nolo contendere* (R. 97-101).

SUMMARY OF ARGUMENT

I

Petitioner's contention that the indictments were subject to dismissal because the Attorney General had not directed the United States Attorney to present the cases to the grand jury is without merit.

The indictments were returned by a duly constituted grand jury. No attack is made on its organization or proceedings.

Executive Order No. 6166 was issued pursuant to authority granted by Congress to achieve the purposes of economy and efficiency in Government. It was not intended to and does not limit the inherent power of grand juries to inquire into all criminal matters within their jurisdiction. Its sole purpose was to transfer to the Department of Justice responsibility for the conduct of all civil and criminal proceedings to which the United States is a party.

Circular Letter 2431, in which the Attorney General directed all United States Attorneys to present evidence to grand juries only when authorized to do so by the Attorney General, was a departmental instruction concerned solely with the internal functioning of the Department of Justice. It is not a public document and patently was not intended to confer rights on defendants. Moreover it was not shown that the circular letter, which authorized United States Attorneys to present evidence without prior authorization from the Attorney General whenever "an emergency calls for

immediate action", was not complied with to the satisfaction of the Attorney General. The indictments were returned on February 28, 1952. The statute of limitations was due to run on one of the major counts in each indictment on or about March 14, 1952. In the absence of evidence to the contrary, the United States Attorney, an agent of the Department of Justice, must be presumed to have acted within his authority (*United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C.A. 7) and in any event his actions were tacitly ratified by the Attorney General.

Petitioner's contention that the circular letter made an instruction from the Attorney General a prerequisite to prosecution also conflicts with the statutory duty of United States Attorneys to prosecute all offenses against the United States. Limitations on this authority will not be lightly implied. *United States* v. *Morgan*, 222 U.S. 274; *United States* v. *Dotterweich*, 320 U.S. 277.

Section 3740 of the Internal Revenue Code on which petitioner also relies is not relevant inasmuch as it relates only to civil proceedings.

II

The trial court did not abuse its discretion in denying petitioner's motion to withdraw his plea of *nolo contendere* after sentence had been imposed. Under Rule 32(d) of the Federal Rules of Criminal Procedure petitioner had the burden of establishing that such extraordinary relief was necessary to "correct manifest injustice." This he has failed

to do. Disappointment in the sentence imposed is insufficient to warrant withdrawal of the plea.

No claim of manifest injustice can be founded on the actions of the United States Attorney or his assistant. Nothing occurred at the various conferences at which the plea to be made by defendant was discussed to cause experienced counsel to be misled. No assurance or commitment was made by the United States Attorney that he would recommend probation and this was clearly understood by petitioner. No assurances were given that opposition would not be made to the granting of probation. In fact the United States Attorney made no statement with respect to probation.

After the pleas of *nolo contendere* were entered the trial court deferred sentencing so that a complete pre-sentence report could first be prepared by the probation officer. At the subsequent sentencing hearing the United States Attorney, two of petitioner's counsel, and the petitioner himself made statements. The United States Attorney first reviewed in detail the charges in those counts of the two indictments which were before the Court for sentencing. He introduced his further remarks by saying he felt he owed a duty to give the "background of the investigation" and petitioner's "history taxwise", making it clear that the civil claims to which he referred were not involved in the criminal proceedings. Petitioner's counsel had an opportunity to reply to the United States Attorney's explanation of the case and two of them did so reply. They emphasized both the fact that peti-

tioner's civil tax liabilities were not before the court and the previous civic record of petitioner. The petitioner himself made a statement requesting clemency. It was not until after the sentence had been announced by the court that petitioner considered the United States Attorney's remarks to have been so unfair as to require him to withdraw his plea.

The record fails to support petitioner's contention that the trial court abused its discretion in rejecting his later claims that he should be permitted to withdraw his plea to "correct manifest injustice."

ARGUMENT

I

The Indictments Were Returned by a Duly Constituted Grand Jury and Are Valid; They Were Not Subject to Dismissal Because Presentation of the Cases to the Grand Jury Had Not Previously Been Specifically Authorized by the Attorney General

The indictments herein were returned by a duly constituted grand jury of the District of Kansas. The petitioner does not attack the propriety of its organization, composition, proceedings or deliberations.

It is elementary that a Federal grand jury has the unquestioned right and duty to inquire into any matter within the jurisdiction potentially involving violations of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the United States Attorney, the Attorney General, or on its own initiative, from evidence it

may gather or from knowledge of its members. See *Hale* v. *Henkel*, 201 U.S. 43, 63-66; *United States* v. *Thompson*, 251 U.S. 408, 413-414; *Blair* v. *United States*, 250 U.S. 273, 282; *Frisbie* v. *United States*, 157 U.S. 160, 163; *United States* v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301, 306, 307 (E.D. Pa.); *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal.); *In re Miller*, 17 Fed. Cas. No. 9552. See *Re Charge to Grand Jury*, 30 Fed. Cas. No. 18,248 (C.C.D. W. Va.), where the court stated (p. 980):

> You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. * * *
>
> In respect to the mode and extent of your inquiries, your own good sense will be your best guide.

The Constitution itself makes the grand jury a part of the federal judicial process. Amendment V, Constitution of the United States; see *Cobbledick* v. *United States*, 309 U.S. 323, 327.

Petitioner's contention that the indictments returned by this duly constituted grand jury are void is based solely on the fact that the United States Attorney in the District of Kansas presented certain facts and evidence to the grand jury without receiving specific prior direction from the Attorney General to do so. (Br. 13.) This, petitioner urges, was contrary to the requirements of Executive

Order No. 6166 (*supra*, pp. 3-4) and Circular Letter No. 2431, issued by the Attorney General to all United States Attorneys and dated August 10, 1933 (*infra*, pp. 40-41). The District Court held this claim to be without merit. The Court of Appeals affirmed.[2]

Unless the inherent power of the grand jury to investigate all criminal matters within the jurisdiction and to render indictments where it believes a violation of law has been committed has been restricted, the indictments herein were clearly lawful and sufficient.

Executive Order No. 6166 was issued pursuant to the Act of March 3, 1933, c. 212, Sec. 16, 47 Stat. 1517-1518 which provided for the reorganization of the executive departments in the interest of efficiency and economy in Government. The text of the executive order itself indicates that its sole purpose was to transfer certain functions then exercised by other Departments of the Government to the Department of Justice:

> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands

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[2] Other district courts have similarly denied motions by defendants to dismiss indictments where United States Attorneys have presented evidence of violations of the revenue laws to the grand juries concerned without specific prior authorization from the Department of Justice. *United States* v. *Fred M. Saigh, Jr.*, No. 27136(3), E.D. Mo. (Eastern Division) (order dated Aug. 20, 1952) (unreported); *United States* v. *Evan Raymond Dale*, Criminal No. 18118, E.D. Ill. (Opinion dated May 1, 1954) (unreported).

> against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Nothing in the Order indicates that the power of the grand jury to indict was in any way intended to be limited. That power, as it existed before the Executive Order was issued, remained unimpaired after it was issued. The sole purpose of Section 5 of the Order was to centralize in the Attorney General responsibility for the conduct of proceedings to which the United States is a party.

Under the Executive Order the function of deciding whether to present evidence to a grand jury concerning violations of the revenue laws was transferred from the Solicitor of the Treasury to the Attorney General. Previously, instructions to prosecute in revenue cases had been submitted to United States Attorneys directly by the Treasury officials concerned. In order to discharge this function which had previously been exercised by the Solicitor of the Treasury, as a matter of internal departmental procedure, the Attorney General, by

Circular Letter 2431, directed all United States Attorneys to present evidence concerning violations of the revenue laws "only when authorized to do so by this office, unless an emergency calls for immediate action." (*Infra*, p. 41).

The Circular Letter is not in any sense an official rule or regulation which in any way concerns the general public, and does not, therefore, have the force and effect of law. The Circular Letter itself is addressed privately to "All United States Attorneys". (*Infra*, p. 40.) No reference to the Circular Letter will be found in the Code of Federal Regulations. It was not when issued, and is not now, a public document. The Circular Letter contains internal office instructions for the guidance of United States Attorneys. Patently, the Circular Letter was intended merely to control the internal functioning of the Department of Justice and was not intended to confer rights upon persons suspected of violating the revenue laws.

The instructions contained in the Circular Letter were issued in connection with the Attorney General's supervision of the work of United States Attorneys. See 28 U. S. C. 507(b). It may be noted that this record discloses constant supervision by the Attorney General over the United States Attorney in connection with the handling of these indictments. It is not denied that the United States Attorney, in this case, having evidence of a violation of law on which the statute of limitations was about to run, presented this evidence to the grand jury without specific prior authorization by the Department of Justice. The

Attorney General might have directed the United States Attorney to seek dismissal of these indictments when they came to his attention, but it is clear that he chose not to do so. The record indicates that when petitioner filed his motion to dismiss the indictments prior to trial on the ground that the indictments were defective because the Attorney General had not directed that the evidence be submitted to the grand jury, the Attorney General caused an affidavit to be filed stating that no statute requires that revenue cases be referred to the Department of Justice in Washington prior to the institution of criminal proceedings and informing the court that in some instances cases are referred directly to grand juries and United States Attorneys without prior review in the Tax Division of the Department of Justice (R. 24-25). The record shows further that before recommending acceptance of pleas of *nolo contendere* as to three counts and moving to dismiss the remaining counts in each indictment, the United States Attorney sought and obtained authority from the Department of Justice to do so, and so informed the court (R. 26).

Moreover, in the Circular Letter the Attorney General has authorized United States Attorneys to present evidence to the grand jury without specific authority from him whenever "an emergency calls for immediate action". (*Infra*, p. 41). The court of appeals found that petitioner made no showing that such an emergency did not exist here (R. 101). Nor did petitioner suggest that the United

States Attorney concerned did not himself believe that such an emergency existed. It may be noted in this connection that the first count of each indictment concerned the evasion of taxes by petitioner for the year 1945—an offense for which prosecution would have been barred by the statute of limitations on or about March 14, 1952. (26 U.S.C. 3748). The indictments herein concerned were returned on February 28, 1952 (R. 1, 3). In a practical sense, the Attorney General has ratified the actions taken in this case by his agent, the United States Attorney. It appears that he was satisfied with the conduct of his subordinate since he took no action to have the indictments set aside and, on the contrary, caused an affidavit to be filed supporting the previous action of the United States Attorney in going before the grand jury to present evidence in these cases. (R. 24-25.) Moreover, the United States Attorney is a part of the Department of Justice. In the absence of evidence to the contrary, he must be presumed to have acted within his authority. *United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C.A. 7).

Petitioner's suggestion that the Circular Letter established a condition precedent to prosecution is untenable for yet another reason. United States Attorneys are under a statutory duty to "prosecute for all offenses against the United States." 28 U.S.C. 507(a)(1).

Patently Executive Order 6166 was not intended to deprive United States Attorneys of their right or relieve them of their duty to prosecute violations

of federal law. See *Hart Coal Corp.* v. *Sparks*, 9 F. Supp. 825, 831-32 (W.D. Ky.). Any limitations on their rights and duties will not be lightly implied. In *United States* v. *Morgan*, 222 U.S. 274, 281-82, this Court said, in disposing of a claim that an indictment was defective for the reason that the defendant had not been given a prior hearing in the Department of Agriculture which he claimed was due him under the statute:

> * * * If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers

> of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

The Court, moreover, more recently held that even where a statute required the Administrator, before reporting a violation for prosecution by the United States Attorney, to give the suspect an "opportunity to present his views", the statute did not establish a prerequisite to prosecution. *United States* v. *Dotterweich*, 320 U.S. 277.

Petitioner further argues that the action of the United States Attorney in presenting evidence to the duly constituted grand jury was unlawful as contrary to the requirements of Section 3740 of the Internal Revenue Code. Section 3740 provides as follows:

> No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. (53 Stat. 460.)

The plain language of this provision indicates that it relates only to civil proceedings. It was so construed by the court below, citing *United States ex rel. Marcus* v. *Hess*, 127 F. 2d 233 (C.A. 3), reversed on other grounds, 317 U. S. 537.

The term "suit" is generally applied to civil actions and is "seldom applied to a criminal prosecution". Black, *Law Dictionary*, 4th ed. 1951, p. 1603. When used in statutes, it has frequently been held that it "does not embrace a criminal prosecution." See, e.g., *United States* v. *Safeway Stores*, 140 F. 2d 834, 838 (C.A. 10). Moreover, the context of Sec. 3740 both internally and in relation to other provisions discloses that it is limited to civil actions. Sec. 3740 applies to suits "for recovery". The expression "suit for recovery" is primarily applicable to civil actions, and not to criminal prosecutions. *Stockwell* v. *United States*, 13 Wall. 531, 543; *Hepner* v. *United States*, 213 U. S. 103, 108-109. Civil remedies are recovered; criminal sanctions are imposed and prosecuted. This is none the less so because it provides for the recovery of taxes, fines, penalties or forfeitures. Forfeitures and penalties under the internal revenue laws are remedial sanctions to aid in the enforcement of the law and are recoverable in civil proceedings. See *Helvering* v. *Mitchell*, 303 U. S. 391, 400-401. Subchapter E, of which Section 3740 is a part, contains eight other sections. These other sections specifically refer to criminal proceedings or to criminal prosecutions where pertinent. (See 53 Stat. 460-62, 26 U. S. C. 1946 ed. Secs. 3741, 3748.)

Finally, this construction is confirmed by the Internal Revenue Code of 1954. Section 3740 of the 1939 Code appears in this new revision as Section 7401. In the revision "No suit" has been changed to read "No civil action". The committee reports

to both the House and Senate state that the section as revised contains "no material change from existing law". H. Rep. No. 1337, 83d Cong. 2d Sess., p. A430; S. Rep. 1622, 83d Cong., 2d Sess., p. 609.

The indictments which were returned by a duly constituted grand jury are valid. An authorization from the Attorney General to the United States Attorney to present evidence to a grand jury is not a prerequisite to prosecution. The order of the District Court, affirmed by the Court of Appeals, denying petitioner's motion in arrest of judgment for the reason that the court was without jurisdiction of the offense should be affirmed.

II

The District Court Did Not Abuse Its Discretion When It Denied Petitioner's Motion to Set Aside the Judgments of Conviction and to Permit Him to Withdraw His Pleas of *Nolo Contendere*

Petitioner contends that the trial court erred in refusing to allow him to withdraw his plea of *nolo contendere* under Rule 32(d) of the Federal Rules of Criminal Procedure. Rule 32(d) provides:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It will be noted that under this Rule the withdrawal of a plea of *nolo contendere* after sentence is imposed may be made only "to correct manifest injustice."

The applicable principles of law are well established. A plea of *nolo contendere* is an admission of guilt for the purposes of the case, and a prison sentence may be imposed on such a plea. *Hudson* v. *United States*, 272 U. S. 451, 455. As the language of the rule makes clear, a person who has entered such a plea has no legal right to withdraw the plea. An application to withdraw the plea is addressed to the sound discretion of the trial court, and an order denying such an application is reviewable on appeal only for an abuse of such discretion. *Friedman* v. *United States*, 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Fox*, 130 F. 2d 56, 59-60 (C. A. 3), certiorari denied, 317 U. S. 666. The issue is whether the plea was entered by petitioner voluntarily and with understanding of its meaning or whether it was attributable to such justifiable ignorance of his rights or such fear, coercion or mistake as would justify the court in concluding that it ought not to be permitted to stand. To warrant withdrawal of a plea, some element of fraud or unfair imposition on defendant at the time the plea was entered must be shown. *Futterman* v. *United States*, 202 F. 2d 185 (C.A.D.C.); *Friedman* v. *United States*, *supra*; *United States* v. *Shneer*, 194 F. 2d 598, 599-600 (C.A. 3); *Williams* v. *United States*, 192 F. 2d 39, 40

(C. A. 5); *United States* v. *Colonna*, 142 F. 2d 210, 211-12 (C.A. 3); *Bergen* v. *United States*, 145 F. 2d 181, 186-87 (C. A. 8). In asking that his plea of *nolo contendere* be withdrawn after sentencing, petitioner had the burden of showing that such extraordinary relief was necessary "to correct manifest injustice." The District Court held that he failed to meet this burden and the Court of Appeals affirmed. The determinations of the two lower courts are entitled to great weight and should not be overturned in the absence of a clear showing of error.

Petitioner contends that he entered the plea of *nolo contendere* because he was led to believe that he would not be given a prison sentence if he entered such a plea. On what does he base this stated belief? He refers to discussions between his counsel and counsel for the Government which were had on April 6 and 7, 1953, after the jury was empaneled. The conference the evening of April 6 was at the invitation of the United States Attorney (R. 67). The three meetings the following day were at the initiative of petitioner's counsel (R. 64-65). During these conferences, the United States Attorney was not unfriendly. Various bases of settling the case were explored. The record shows that talks opened with a discussion of a plea of guilty (R. 62-63, 67). The United States Attorney stated that Mr. Luce, petitioner's counsel from Washington, first suggested that defendant might plead *nolo contendere* to one count in each indictment (R. 67). Mr. Luce, in his affidavit, states that *nolo contendere* was first suggested by the United States Attorney's assistant, Mr. Bingham (R. 63). All agree that the

various aspects of the plea were discussed, including the question whether such a plea would be authorized by the Department of Justice (R. 56, 59, 64, 69) or accepted by the court (R. 59, 63, 68). Finally the question of probation was discussed (R. 59, 60, 65, 68). The entire course of the conferences reveals an attempt by petitioner's experienced counsel to work out for their client as favorable a disposition of the case as possible (R. 69, 70). All of these conferences were duly reported to petitioner by his counsel "in detail" (R. 66) and his decision to plead *nolo contendere* was reached only, as petitioner himself states, "after considerable discussion and consideration" (R. 47). It is clear that his decision to change his plea was both considered and voluntary in every sense of the word.

It should be noted that there is no suggestion here that defendant was misled by any assumed assurance or agreement by the United States Attorney that if he would plead *nolo contendere* he would get probation. See *United States* v. *Shneer*, 194 F. 2d 598, 600 (C. A. 3). Apparently this had been one of the objectives of petitioner's counsel, for one of them, Mr. Harley, records in his affidavit that Messrs. Luce and Jochems reported to him in petitioner's presence late in the evening of April 7 that they had been "unable to obtain a commitment from Mr. Davis that he would make a recommendation for probation or suspended sentence" (R. 60). Petitioner personally was informed that the United States Attorney had said he would not be requested to make a recommendation to the court (R. 46).

The United States Attorney further informed petitioner's counsel that he would not recommend probation (R. 69). This is not disputed (R. 46). On the question whether the United States Attorney at any time stated that he would not oppose probation, as asserted by petitioner's counsel (R. 59, 63) but denied by the United States Attorney (R. 70) and his assistant (R. 71), the trial court found "that no promise of probation or leniency was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government" (R. 92). The core of petitioner's complaint comes down to the contention that the three counsel of his choice, all experienced lawyers, would not have advised him to plead *nolo contendere* if they had found the United States Attorney less friendly and cooperative in the course of these conferences on the eve of trial. This is a flimsy ground on which to base a motion to withdraw a plea after sentence has been pronounced.

Petitioner apparently attributes the court's action in sentencing him to imprisonment to an alleged "change in attitude" on the part of the United States Attorney between April 6 when the pleas were entered, and May 26 when the sentencing hearing was held. (Pet. Br. 24-25.) The court had deferred sentence to permit the preparation of a complete pre-sentence report by the probation office (R. 27). At the pre-sentencing hearing on May 26 the court invited the United States Attorney to make a statement about the case (R. 28, 91). The United States Attorney then reviewed

in detail the charges in those counts of the two indictments which were before the court for sentencing (R. 28, 29). He stated that the remaining counts in each of the indictments had been dismissed by the Government (R. 28). The United States Attorney then proceeded to give what he called the "background of the investigation" and petitioner's "history taxwise" (R. 29). In the course of this he informed the court of the extent of the civil liabilities claimed by the Government and noted some of the difficulties the Government had had in dealing with petitioner during the course of its investigation of his income tax returns. In closing he summarized the Government's claims as to petitioner's civil liabilities, noting that these amounts were not involved in the criminal case. (R. 29-34.)

The United States Attorney was followed by petitioner's counsel, Mr. Luce of Washington, D. C., who stressed, among other things, that the civil liabilities which had been mentioned were not before the court and that their amount was in dispute and would have to be settled by the Tax Court of the United States (R. 34). Mr. Luce noted that the United States Attorney's recommendation that the *nolo contendere* pleas as to three counts be accepted and that the remaining counts in each indictment be dismissed had been made with the approval of the Department of Justice (R. 35). Mr. Jochems, also of counsel for petitioner, suggested that petitioner's difficulties stemmed from his being too busy on bigger things and that there was no

actual fraud. He discussed the civic record of petitioner and asked that petitioner be placed on probation for whatever sentence the court imposed, mentioning in this connection that his health was not good. (R. 35-39.) Petitioner himself then made a brief statement beseeching clemency (R. 39).

The record of these proceedings at the sentencing hearing reflects the deep concern of petitioner's counsel for the very serious difficulties in which their client found himself. They surely hoped their client would not be sentenced to imprisonment, but it is equally clear that they appreciated that this was a matter within the discretion of the trial court to whom they were addressing their pleas for clemency.

Petitioner complains particularly with respect to the United States Attorney's mentioning the counts of the indictment which had been dismissed and his discussion of the civil liabilities of petitioner (Br. 24). But he fails to mention, as to the former, that the United States Attorney in his statement carefully segregated for the information of the court the charges in the counts of the indictments which were before the court for sentencing (R. 28, 29) and introduced his further discussion by saying that he felt he owed a duty to the court to review petitioner's tax difficulties (R. 29). With respect to petitioner's civil liabilities, he indicated clearly that the Government's claims as to petitioner's civil liability were not involved in the criminal case (R. 33-34), a fact which was stressed in turn by

each of petitioner's counsel in their statements to the court (R. 34-36). Nor was this likely in any sense to mislead the court. In a previous conference with the court in chambers to determine whether the court would accept a plea of *nolo contendere* the court had asked petitioner's counsel if there were any civil liabilities against petitioner. When informed that there were, the court remarked that even where a plea of guilty was entered this was always without prejudice to defendant's rights to dispose of his civil liabilities. (R. 64-65.)

Another factor which puts in some perspective petitioner's claims of unfairness on the part of the United States Attorney is the emphasis given the matter of the history in petitioner's family of Berger's disease. (Pet. Br. 24, 25, 34.) It appears that in the preliminary conferences with petitioner's counsel, the United States Attorney had mentioned that the Government investigation had revealed a history of Berger's disease in petitioner's family (R. 68). Petitioner states that the United States Attorney had informed his counsel that he "thought" the petitioner was subject to this disease (Pet. Br. 24). He now complains that the United States Attorney "did not mention the facts" as to Berger's disease in his address to the court (Pet. Br. 25). "The facts" as to this medical history were peculiarly within the knowledge of petitioner. His counsel, in his plea to the court for clemency, contented himself with the statement that "The man's health is not good, as is

shown by a medical report which was submitted to the Probation Officer." (R. 38.) The record in this Court does not show the facts as to Berger's disease and its relation, if any, to defendant. It does indicate, however, that a medical report was before the court at the time of sentencing (R. 27, 38).

No charges of prejudice, manifest injustice, or hostility on the part of United States Attorney were made by petitioner's counsel after hearing his explanation of the case to the Court. They had an opportunity to reply to the Government's statement and to make their own statement of the case and did so reply (R. 34-39). There was still time under Rule 32(d) to seek to withdraw the *nolo contendere* plea, as sentence had not yet been imposed. It would appear that petitioner's attorneys did not then consider that the United States Attorney's attitude was so different from what they anticipated as to lead them to advise petitioner to withdraw his plea. Instead, they concentrated in their statements to the court on those elements in the case which in their mature judgment indicated that probation would be a proper sentence.

Petitioner obviously was disappointed in his sentence. It is clear that the advice of counsel as to the sentence which will probably be imposed (*Ridgeway* v. *United States*, 205 F. 2d 680 (C.A. 6)), or defendant's expectations as to the sentence which will be imposed (see *United States* v. *Shneer*, 194 F. 2d 598, 600 (C.A. 3)), or the severity of the sentence which is actually imposed (*Stidham* v. *United States*, 170 F. 2d 294, 298 (C.A. 8) do not

provide grounds for the withdrawal of a plea. Petitioner has contended, therefore, that he was led to believe that the United States Attorney would not oppose probation, and complains of the United States Attorney's statements to the court at the sentencing hearing. The court of appeals, after holding that the trial court's finding that the United States Attorney had made no promise of leniency was supported by the evidence, further concluded as follows (R. 101):

> Even if it be assumed that the United States Attorney promised that he would not oppose an application for probation, there is nothing in this record to indicate that he did actively oppose probation. He was under a duty to present the relevant facts with respect to the offenses charged to the court. Those facts may have indicated that probation was not appropriate, but that cannot in any sense be construed to be a violation of his alleged promise not to oppose probation.

Determination of whether it would work "manifest injustice" to refuse to permit petitioner to withdraw his plea of *nolo contendere* after sentencing is a matter peculiarly within the competence of the trial court. Cf. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 216. The trial court saw and heard the United States Attorney and petitioner's counsel when the jury was sworn on April 6th, 1953 (R. 90), in the conference in chambers on April 7th (R. 64), in the court proceedings on

April 8th at which petitioner's pleas of *nolo contendere* were filed (R. 26-27), and in the later proceedings on May 26th, of which petitioner now complains, at the conclusion of which petitioner was sentenced. (R. 27-40.) If he believed there was merit to petitioner's claims, Rule 32(d) authorized him, in the exercise of his discretion and with the perspective available to him alone, to set aside the judgment and permit defendant to withdraw his plea. The evaluation of the trial court as to the merits of petitioner's claims is peculiarly entitled to weight where, as here, petitioner stresses the "attitude" of the United States Attorney in addressing the court as distinguished from the remarks he made. (Pet. Br. pp. 24, 36.)

This is not a case, such as those relied on by defendant, where the accused was not represented by counsel and was not familiar with the charges against him. *Von Moltke* v. *Gillies*, 332 U.S. 708; *Bergen* v. *United States*, 145 F. 2d 181, 187 (C.A. 8). This case is characterized rather by the vigor and competence of petitioner's counsel, including Mr. Luce of Washington, D. C., and Messrs. Jochems and Harley of Kansas, at every stage of the proceedings, and in particular by the thoroughness of their inquiries and the obviously soul-searching nature of their conferences with petitioner on April 6th and 7th with respect to the pleas to be entered (see R. 60).

Nor is this a case like *United States* v. *Lias*, 173 F. 2d 685 (C.A. 4), quoted at length by petitioner,

where the trial court, in the exercise of its discretion under Rule 32(d) permitted the defendant to withdraw a plea of guilty when it appeared that defendant was misled by statements made by the court to his counsel leading him to believe he would be placed on probation if he would so plead. Here the court was assured by petitioner's counsel prior to acting on the motion and found "that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of *nolo contendere.*" (R. 92.) Nor is *Kercheval* v. *United States*, 274 U.S. 220, in point since there the court had allowed the defendant to withdraw his plea and the only question was the right of the prosecution to use the plea as evidence in the trial that followed.

We submit that petitioner has not shown that the trial court clearly erred in dismissing his motion to withdraw his plea.

It is not uncommon for cases, including criminal cases, to be settled on the eve of trial. There will frequently be conferences among counsel representing both sides of the controversy during which various formulæ for the disposition of the case will be explored and during which the factors which bear on the decisions which each side must make will be discussed. It is consistent with the effective administration of justice that such conferences should take place, it being borne in mind that the settlement of any criminal case is a matter within the control of the court. The courts will protect a

defendant who has been coerced or misled in some important respect in deciding to file a plea of guilty or *nolo contendere*. Under Rule 32(d) a motion to withdraw a plea of guilty or of *nolo contendere* may be made at any time before sentence is imposed. But the rule establishes a higher standard where a defendant seeks to withdraw his plea after sentence. In such a case, withdrawal of the plea—which has the effect of adding a second string to the defendant's bow—will be permitted only "to correct manifest injustice". This is for the very obvious reason that the defendant who pleads guilty or *nolo contendere* and receives a substantial sentence from the court will almost invariably feel, as petitioner says he does here, that he was misled in making his plea. The trial court, after reviewing the record and hearing argument, determined that no manifest injustice would result from its denial of petitioner's motion to withdraw his plea. The Court of Appeals affirmed. We submit that nothing in this record would justify overturning the considered judgment of the two lower courts.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1954.

APPENDIX

The full text of Circular Letter No. 2431 appears below:

DEPARTMENT OF JUSTICE
Washington, D. C.

August 10, 1933.

CIRCULAR LETTER No. 2431

TO ALL UNITED STATES ATTORNEYS:

Re: Prosecutions Involving Violations of Revenue Laws.

The attention of all United States Attorneys is called to Section 5 of Executive Order of the President, No. 6166, dated June 10, 1933, promulgated under authority of Section 16 of the Act of March 3, 1933, Public No. 428, 47 Stat. 1517, which reads in part as follows:

SECTION 5—*Claims by or against the United States*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

* * * * *

In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted.

Respectfully,

For the Attorney General,

WILLIAM STANLEY,
Assistant to the Attorney General.

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